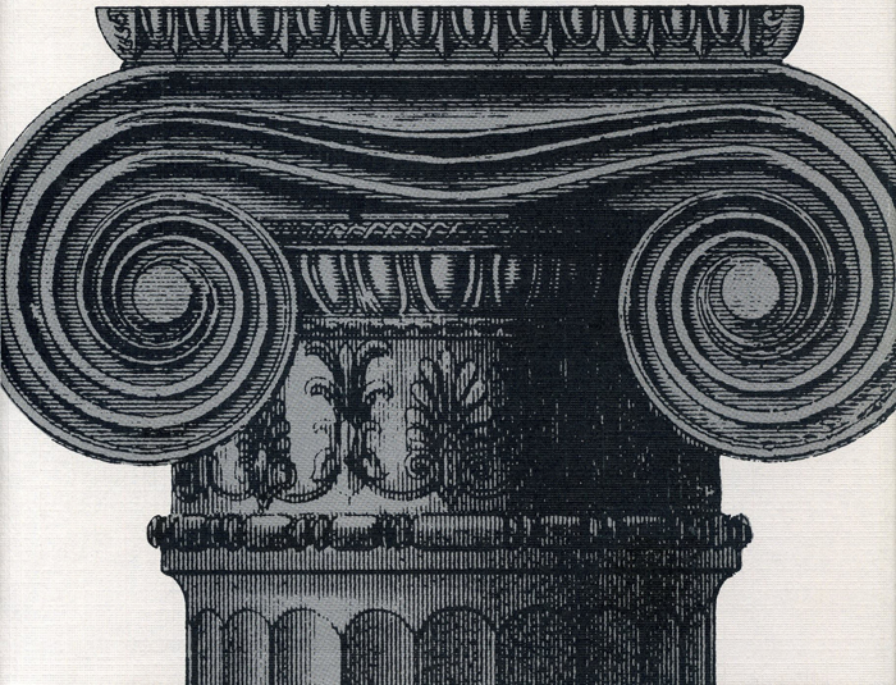
RAPHAEL SEALEY

THE ATHENIAN REPUBLIC

Democracy or the Rule of Law?



THE ATHENIAN REPUBLIC

Also by Raphael Sealey

A History of the Greek City States ca. 700–338 B.C.
Essays in Greek Politics

THE ATHENIAN REPUBLIC

Democracy or the Rule of Law?

RAPHAEL SEALEY

The Pennsylvania State University Press
University Park and London

Library of Congress Cataloging-in-Publication Data

Sealey, Raphael.
The Athenian Republic.

Bibliography: p.
Includes index.
1. Rule of law—Greece—Athens. 2. Courts—Greece—Athens. 3. Athens (Greece)—Constitutional law.
I. Title.
LAW 340.5'3'85 86-9512
ISBN 0-271-00443-6

Copyright © 1987 The Pennsylvania State University
All rights reserved

To
Dorte-Freyja Sealey

This page intentionally left blank.

Contents

Preface		ix
1	Continuity in Athenian Society	1
2	Athenian Citizens	5
3	The Sources of Law	32
4	The Sanction	53
5	*Demokratia*	91
6	Toward a History of the Constitution	107
	Appendix to Chapter 6: *Axones* and *Kyrbeis*	140
7	Athens and the Rule of Law	146
Notes		149
Index		178

This page intentionally left blank

Preface

In undertaking this study I have drawn on more kindnesses done me by more people than I can specify. The immediate impulse to write came from re-reading H. S. Maine's *Ancient Law,* which was first recommended to me long ago by the late Idris Deane Jones. It will be readily apparent that I have drawn extensively on studies published by the late H. J. Wolff, and by E. Ruschenbusch and M. H. Hansen. Even though I have disagreed with each of them on some points, my debts to them are far greater than my doubts. Private discussion with D. Cohen has brought me pleasure and profit. I have had singularly considerate treatment from Mr. Philip Winsor of the Pennsylvania State University Press and from his two readers.

Choosing a title for the book proved to be unexpectedly difficult. English has no word precisely equivalent to *Rechtsstaat.* "The Athenian polity" was considered, but the word is archaic and affected. "Republic" is better, even though somewhat comprehensive. It excludes the arbitrary rule of a despot. Besides it resounds across European centuries from *res publica* to *rzeczpospolita.*

Many of the ideas presented here were developed in more polemical form in the following articles: "Probouleusis and the sovereign assembly," *CSCA.* 2 (1968): 247–69; "The origins of *demokratia,*" *CSCA.* 6 (1973): 253–95; "The Athenian concept of law," *CJ.* 77 (1981–82): 289–302; "The Athenian courts for homicide," *CP.* 78 (1983): 275–96; "On lawful concubinage in Athens," *CA.* 3 (1984): 111–33; and "How citizenship and the city began in Athens," *AJAH.* (forthcoming). I thank the editors of those journals for publishing my arguments in the first place and for agreeing to my renewed use of them.

I am also indebted to the Superior Court of Alameda County for showing me how bad Californian law is. So I decided to expound a

decent system of law to some Californian students, and this book is a by-product of the lectures which I gave.

If I have succeeded in keeping my feet on the ground, I owe that to the example set by the dedicand.

Raphael Sealey
Berkeley, California

1
Continuity in Athenian Society

Hekataios of Miletos speaks thus: I write this, as I believe it to be true. For the utterances of the Greeks are many and, in my opinion, ridiculous.

—Die Fragmente der griechischen Historiker, I 1 F1.

In 1980, for the first time in his life, the author of this essay visited Bacharach on the middle course of the Rhine and stayed for a week in a guesthouse beside the remains of the medieval wall of the town. He was impressed by continuity. People had traveled the valley by land and by boat since Roman times and probably a good deal earlier. When the authority of the city of Rome disintegrated, there was no breach of social evolution in the Rhineland, but conquerors and new settlers continued cultivating the vine and took over into their Germanic tongue not only words for useful inventions ("Fenster," "Ziegel") but also some for the higher arts of civilization ("schreiben," "dichten"). Further north, at Cologne, excavation has revealed how the residence of the Roman governor of Lower Germany was transformed step by step into the dwelling of a Frankish chieftain. Even though the Empire was often an empty idea, it was never forgotten, and through the reception of Roman law in Germany in the fifteenth and sixteenth centuries Roman thought played a lasting part in the formation of the German nation.

At Bacharach the present writer thought about these things and contrasted the fortunes of his native island. In England Roman authority came to an end early in the fifth century, although the end is obscure and its immediate effect is difficult to reconstruct. Later the Norman Conquest transformed society radically. Later

still the Reformation cut the country off from the rest of Europe. Surely the histories of England and of the Rhine Valley furnish a contrast between repeated catastrophe and continuity.

Ulrich von Wilamowitz-Moellendorff visited England, notably Oxford, Cambridge, and Westminster, in 1908. He was impressed there by continuity, as is shown by his reflections in his memoirs (*Erinnerungen,* Leipzig, second edition, 1929, 312). England had not experienced a Thirty Years' War or French invasions. At Magdalen College, Wilamowitz lived in the rooms and slept in the beds where Henry VIII, the founder of the college, and Anne Boleyn had slept. Observing that in England even the wearing of wigs continued, he remarked: "Die Deutschen kommen sich heute recht fortgeschritten vor, wenn sie alle solche Traditionen zerstören."

Can it be that continuity is in the eye of the alien beholder? that one sees catastrophic changes in the development of one's own land but overlooks them abroad? If so, current accounts of the Athenian constitution are anomalous. The modern student is necessarily an alien in his study of ancient Athens, and so one might expect him to discern continuity, not catastrophic change. Yet historians have commonly directed attention to a series of major changes, associated with the names of Solon, Peisistratos, Kleisthenes, and Ephialtes, and to two revolutions and restorations in the later part of the fifth century. They have inquired into the extent of each transformation. Careful illustrations of this type of inquiry are to be found in the narrative section (II, 783–939) of the handbook by Busolt and Swoboda and in Hignett's history. Some authors have minimized one set of changes while magnifying others. In the field of Athenian constitutional history little attempt has been made to trace abiding habits, assumptions, or principles, although a student of comparative law would expect to find such things.

The anomaly is to be explained, in part at least, by the influence of Aristotle's way of thinking. The treatise, *The Constitution of the Athenians,* composed by him or in his school, portrayed the history of the Athenian constitution as a series of *metabolai,* or changes of type. Even before 1891, when a large part of the treatise was published from the London papyrus, Aristotle's approach to the study of constitutions had been influential through his *Politics.* One of the more original doctrines of the *Politics* was the attempt to distinguish different kinds of democracy. In his classificatory approach to the study of politics Aristotle was influenced not only by the habit of mind of a biologist but also by the tradition of political theory. Plato and other predecessors of Aristotle had tried to define

and characterize forms of government; Aristotle made a major advance in political theory when he recognized not one but four forms of democracy.[1] But the classificatory approach of the political theorist is unable to penetrate to the deeper levels of constitutional development. It fails to recognize lasting features of law and custom, which persist through changes in governmental superstructure. In their concept of law and in the steps which they took to safeguard the rule of law the Athenians developed a way of thinking which owed nothing to the tradition of political theory.[2]

Instead of making a chronological narrative the starting point for understanding the Athenian constitution, this study pursues that purpose by looking into some aspects of Athenian law. This mode of proceeding turns the inquiry in the direction of discovering continuity. Historians of law have remarked on the conservatism of the two systems which have had the widest influence and the longest recorded history, namely, Roman and English law.[3] The Athenians too were conservative in their legal institutions. They called their code "the laws of Solon," even after it had been added to and thoroughly revised; their laws on homicide were couched in archaic language which Demosthenes had to explain (for example, at 9.44), and their provisions for recognizing the legitimacy of children depended in the main on the phratry, an association of obscure origin, probably older than the city itself (cf. pages 12–15 and 108). The law of any community is likely to be conservative, unless foreign conquest brings radical and lasting change. Law is conservative because social opinion is reluctant to reverse itself once it has acknowledged the validity of an institution, the legitimacy of a practice, or the existence of a right. Society would rather put restrictions on the exercise of a right than subvert it wholesale.

The legal fabric of a community usually displays a high degree of homogeneity, even though it may include anomalous features. Nearly all Athenian courts in the fourth century were of a single type, the *dikastērion,* but the courts for trying homicide were exceptional. When an exceptional feature occurs, it is often a relic of an early stage and may even provide a clue toward explaining how the more normal feature arose (as will be maintained in reference to the homicide courts in chapter 4). Since the legal fabric of Athenian society was largely homogeneous, one can start an inquiry at any of many points in that fabric and discover the same basic principles. But not all aspects of law are of equal interest to the constitutional historian. Although "constitution" is not easy to define, let it be said as a rule of thumb that constitutional history is

concerned with the nature, structure, and location of authority in society. Consequently, two of the subjects regularly studied by legal historians are of interest here. They are the sources of law and the sanction of law. *Sources* in this context means, not historical sources, but the rules, principles, customs, doctrines . . . on which a judge draws in deciding a lawsuit. A litigant bases his arguments on law which he draws from the same sources. Indeed the same sources are recognized even by the happy man who conforms his conduct so well to the law of his community that he never enters a courtroom. *Sanction* means the legal procedures available to someone who believes that the law has been transgressed and who sets about to accomplish a remedy. The study of sanctions is the study of the way disputes are brought into court and judged. A right has no value unless there is a sanction available to uphold it.[4] An understanding of the sources and sanction of law in a given community brings insight into the nature, structure, and location of public authority.

But before the topics of sources and sanctions are broached, it will be necessary to ask what people were subject to Athenian law. Clearly Athenian law applied to people who were in Attica, for Athenian officers could only exercise authority over the people whom they could reach. So something will need to be said about the size of the population and about the juridically different kinds of people composing it. Ensuing chapters will deal with the sources and sanction of law and will seek to discover how the Athenians conceived the authority of the laws. Bearing that concept in mind, one can confront the ideas of democracy and of other forms of government, ideas favored by political theorists, and one can ask how those ideas compare with the principles of authority recognizable in Athenian law. It will remain to survey the development of the constitution chronologically and in particular to assess the activities of Solon, Kleisthenes, and others in the perspective of continuity. Finally, it will be possible to say a little about the lasting significance of the Athenian contribution to organized society; this topic will require some notice to be taken of modern developments.

2
Athenian Citizens

Aber niemand weiss besser als eine Schneiderin, dass die Menschen nicht gleich sind.
—Gerd Gaiser, *Schlussball* (Munich, 1958), 107

This chapter will set out to discover the standard citizen of Athens. The "standard" citizen does not mean the average citizen. Indeed it will soon become clear that the standard citizen was not as poor as the average citizen. The standard citizen is the type of citizen envisaged by the laws and institutions. He is the citizen whom the lawgiver assumed as typical in drafting laws. Lawgivers devoted much thought to drawing up rules about property, but these rules could not concern those numerous citizens who had none. Even so, it is reasonable to imagine that the standard citizen was what every citizen aspired to be. The values and norms of behavior recognized by the standard citizen determined the values and norms of behavior for the whole society.

Section I will deal with the citizen-population and an economic division within it. Section II will take note of the rest of the population, namely, the resident aliens and the slaves. Section III will survey the status of women. The distribution of citizens into demes and phratries and the admission of young men to those units will be considered in section IV, and the relation of women to the phratry will be treated in section V. Section VI will treat the institution of marriage, a topic to which section III pointed. Following on marriage, section VII will discuss the transmission of citizenship by descent. Citizenship and capacity for succession to immovable property were transmitted together in Athens, and so section VIII will outline the laws of inheritance. Section IX will state conclusions bearing on the standard citizen and say a little about his origins.

I

The clearest and best figures for the population of Attica come from the end of the classical period. Demetrios of Phaleron, who controlled Athens for the Macedonians from 317 to 307 B.C., held a census. The Hellenistic scholar Ktesikles (reported by Athenaios 6. 272c) gave the findings of the census as 21,000 citizens, 10,000 metics, and 400,000 slaves. The figure for citizens gains some confirmation from an occurrence of 322. In that year, at the end of the Lamian War, Antipater imposed a settlement on the Athenians and one of its provisions restricted the right to vote (and doubtless eligibility for office) to those owning property worth at least 2,000 drachmas. The number of citizens retaining the franchise was 9,000 and the number disfranchised was 12,000.[1]

For the opening of the Peloponnesian War, Thucydides (2.13.6–8) gives an account of the forces under arms and implies that citizens were more numerous and wealthier than in 322. His figures include (1) a force of 13,000 hoplites available for expeditionary service; (2) a further force of 16,000 hoplites, serving in garrisons and fortifications and drawn from metics and from those citizens who were too old or too young for expeditionary service; and (3) cavalry and mounted archers numbering 1,200. Some of the cavalry and mounted archers may have been metics. Even so, the number of citizens of an age for expeditionary service as hoplites or cavalry was evidently more than 13,000. This total is a good deal higher than the 9,000 men of substance, who owned at least 2,000 drachmas in 322. It is not surprising to discover that men of substance were more numerous in 431, when Athens was at the height of its power.

More interest attaches to a figure attested for 411. The professed program of the revolutionaries in that year was that control should be entrusted to those most able to serve the state with their property and persons, and these were at first estimated at not more than 5,000. In the fall of the year the Athenians deposed the revolutionary council of four hundred, entrusted control to the 5,000 and defined these as the citizens able to serve as hoplites.[2] A little later Polystratos was accused of complicity in the revolution. In his defense he admitted that he had served on the board charged to enroll the 5,000, but he said that he had enrolled 9,000 instead.[3] If one allows for the exaggeration of a pleader, one should suppose that the board on which Polystratos served enrolled rather less than 9,000, but probably something between 8,001 and 8,999. Such

a figure is strikingly similar to the 9,000 who retained the franchise in 322 under the settlement of Antipater.

The property qualification recognized for hoplite service in 411 and for the franchise in 322 can probably be translated into terms of real economics. A small-holder needs at least a recognizable minimum of land in order to maintain himself and his few dependents; his small-holding ceases to be economically viable if partial alienation decreases it below the minimum. The 9,000 citizens who retained the franchise in 322 should probably be identified as those who had at least the minimum of land needed for subsistence farming. They were accordingly available for hoplite service in defense of the territory. As men possessing land, even as poor men possessing land, they had a sense of independence. The remaining 12,000 citizens, who lost the franchise in 322, were destitute or nearly destitute. They depended for survival on the munificence of the wealthy and on employment, usually casual employment, including service on public works and in the fleet.[4]

It appears that there were about 9,000 men of substance among the citizens in 411 and in 322. In both years Athens had recently suffered human and economic losses. In 411 the disaster in Sicily was recent and the Athenians were fighting their enemies on the east coast of the Aegean. In 322 they had been defeated in the Lamian War. At times in the fourth century the level of general prosperity and the number of men of substance may have been higher, but it is not likely that the Athenians ever recovered the wealth enjoyed in 431. Probably in the fourth century the total of men of substance was sometimes rather more than 9,000, perhaps about 10,000, and they formed rather less than half of the adult male citizens.

II

The laws of Athens were designed by and primarily for Athenian citizens, but some note should be taken of the other inhabitants of Attica, namely, metics and slaves. The term "metic" (*metoikos)* is often and defensibly paraphrased as "resident alien." Metics paid a tax, the *metoikion,* at an annual rate of twelve drachmas for a man and six drachmas for a woman.[5] In the fourth century it is likely that an alien became a metic and liable for the *metoikion* by staying in Attica a specific number of days, perhaps a month;[6] it is not

likely that there was any more abstract requirement, such as an intention of permanent residence.

The census taken by Demetrios of Phaleron reported a total of 10,000 metics. Since the figure for citizens recognized only male adults, one might suppose that the figure for metics too excluded women and children. On the other hand, it is reasonable to guess that in counting metics Demetrios drew on the means employed for levying the *metoikion*. Since that tax was exacted both from male and from female metics, the total of 10,000 metics may have included women as well as men.

There are further uncertainties. Hardly anything can be said about the distribution of wealth among metics. Some became very rich; such were Kephalos in the fifth century and Pasion the banker in the fourth.[7] Doubtless they were exceptional, if it is right to suppose that there were more poor people in Athens than rich. But it is not possible to say what proportion of metics were of moderate wealth and what proportion were very poor. Thucydides' figures for Athenian forces in 431 (page 6 above) show that an unstated number of metics could afford hoplite equipment.

People acquired metic status in each of two ways. On the one hand, there were strangers who originated from elsewhere and came to Athens. Historians have sometimes supposed that a man of this kind was the typical metic. That may be true. On the other hand, if an Athenian citizen manumitted one of his slaves, the former slave became a metic.[8] A few such persons can be named. The extensive possessions of Euktemon included a lodging house in the Peiraieus and another in the Kerameikos. He entrusted the former to a freedwoman of his. Alke was at first a slave of Euktemon and was kept as a prostitute in the lodging house in the Peiraieus. Later Euktemon put her in charge of the lodging house in the Kerameikos. In old age he settled there to live with her.[9] Possibly many metics were erstwhile slaves, who remained in the service of their former masters after manumission. This hypothesis helps to explain why there were so many metics in Athens as the census of Demetrios indicates, even though metic status was considered inferior and burdensome.[10] People like Alke had nowhere else to go.

About slaves little is known and therefore little should be said. The census of Demetrios of Phaleron, as reported by Ktesikles (page 6 above), said that there were 400,000 slaves in Attica. In a lawsuit arising in the aftermath of the battle of Chaironeia, Hypereides (fr. 29 Kenyon) said that there were more than 150,000 slaves. Both figures are amazingly high in proportion to the free

population. Hypereides' figure is probably a guess, and the figure attributed to Demetrios may be no better, since he may not have had reason to attempt a count of slaves. Some historians have tried to ascertain the total of slaves by studying the annual consumption of grain in Attica. The method is promising, but it allows a large margin of error.[11] The most cautious procedure is to start from the best-attested figure which has a bearing on slaves. Agis seized Dekeleia in northern Attica early in 413 and stayed there with a garrison until the end of the Peloponnesian War. Thucydides (7.27.5) says that "more than 20,000" slaves deserted the Athenians in consequence of the occupation of Dekeleia. The reliability of this figure has been doubted.[12] But doubt here is not justified. If an officer commands a garrison in hostile territory and if professed deserters from the enemy join him, he interrogates them with care; for if he does not do so, he is not likely to succeed in his mission. Agis and his associates had grounds on which to base an estimate of the number of slaves who deserted to them. Not all of the slaves who deserted need have gone to the fortress at Dekeleia, but Thucydides, who says (5.26.5) that he had Peloponnesian sources, may have started from good information, supplied by Agis or his officers, in reaching an estimate of more than 20,000. One may conclude that the loss of more than 20,000 slaves was a large disaster.

Slaves could be employed in a great variety of activities. Doubtless the labor in the silver mines at Laureion was wholly servile. When Xenophon (*Ways and Means* 4) recommended increased exploitation of the mines, he envisaged slave labor. Toward estimating the role of slaves in the Athenian economy the crucial question is whether they were employed on a large scale in agriculture. Opinions on this have varied, and direct evidence is lacking. An indirect argument carries some weight. In Athens of the fourth century men who owned large amounts of land usually owned, not a compact parcel, but scattered plots. If they had relied mainly on servile labor to cultivate such holdings, the costs of supervision would have been high. It was more profitable to entrust the parcels of land to tenants on varying terms.[13]

III

Among citizens there were not only adult men but also women and children. Women were subject to severe restrictions. Isaios (10.10) cites laws which prohibited a woman or a child from making a

contract where the object at stake was worth more than a *medimnos* of barley. The orator inferred that neither a woman nor a child could make a will. A woman had to have a guardian or master (*kyrios*), usually her father or, after his death, her brothers. She could not contract her hand in marriage; she was given in marriage by her *kyrios,* and in consequence his guardianship ceased and the husband became *kyrios* of the woman.[14]

A woman was not wholly lacking in legal personality. In the lawsuit illustrated by Isaios 3 (*On the estate of Pyrrhos*) both Phile, who professed to be the daughter of Pyrrhos, and the speaker's mother claimed the estate. Moreover, each of the women is said to have initiated legal action in pursuit of her claim (3.2–3). But each of the women was represented by her *kyrios,* Phile by her husband and the other claimant by her son. Again in another speech of Isaios (7.31) two sisters are said to have the inheritance of their deceased brother. Even so, it is not misleading, though strictly speaking inaccurate, to say that a woman could not sue or be sued. At a hearing in court, and at the steps leading to a hearing, a woman could not speak for herself but had to be represented by her *kyrios*. In litigation her relationship to her *kyrios* was much like that of client to attorney in modern practice.

A woman could commit an offense. The first speech of Antiphon was composed for delivery against a woman who was accused of bringing about the death of her husband by poisoning. The accused woman, however, did not plead in her own defense but was represented by her son. The defense probably said that the draught administered had been intended not to cause death but to restore the husband's alienated affections.[15] But the legal position of a woman taken in adultery illustrates the extent to which the law diminished her personality. If a man took another man's wife by rape or seduction, redress was available to the aggrieved husband and he could inflict physical ill-treatment on the adulterer.[16] The offense was called *moicheia* and the term did not distinguish between rape and seduction, since the law did not inquire into the wishes of the woman. Moreover, the woman taken in adultery was not treated as guilty of an offense. Her husband, on convicting the *moichos,* was required to divorce her, and she was excluded henceforth from public cults, but this exclusion was not imposed as a punishment. Only if she took part in public cults did she become subject to punishment.[17]

Aristotle in the *Politics* offered a view which, though not neces-

sarily the origin of the disabilities of Athenian women, could be invoked to rationalize them:

> The free rules over the servile in one way, the male over the female in another, and the man over the child in yet another. All the partners possess the elements of the human mind, but they possess them in different ways. The slave does not have the faculty of deliberation at all. The female has it but in an indefinite form. The child has it but in an imperfect form.[18]

For the most part a woman was regarded as a child who never grew up. She was not considered capable of forming a serious and constant purpose. Therefore, she could not make a contract where more than a trivial amount was at stake. Her father or, after his death, her brother(s) had the tasks of caring for her in childhood, of finding her a good husband, and of providing a dowry which was intended for her subsistence. In selecting a bridegroom a kind father might take into account the wishes of his daughter, along with other considerations, but if he allowed his daughters free choice of the men to whom they were to be given in marriage, this was remembered as an act of unusual munificence.[19] Yet the law was not wholly consistent in treating women as permanent children under wardship. As noted above, if a woman committed homicide, her act was treated, not as a private matter requiring disciplinary action within the family, but as an offense to be tried in a public court.

There was customarily a marked disparity of age between husband and wife, and this disparity goes some way to explain the disabilities of women. Aristotle (*Politics* 7.1335a6–35) recommends that a man should marry when he is about thirty-seven years old and a woman should be given in marriage when she is about eighteen. Since his recommendations conclude an argument against excessively early marriages, it should be inferred that girls were often given in marriage before they reached eighteen. Ischomachos, whom Xenophon (*Oikonomikos* 7.5) portrays as conversing with Sokrates, took a wife who was not yet fifteen years old. Several centuries earlier Hesiod (*Works* 695–98) recommended that a man should marry when he was about thirty and that he should take as wife a woman who was four years past puberty. Solon (fr. 27 lines 9–10 West) thought that a man should marry when he

was between the ages of twenty-eight and thirty-five. The elder Demosthenes, the father of the orator (27.4; 29.43), died when his daughter was five years old, and so it could be expected that she would be given in marriage ten years later.

Economic conditions probably account for the customary ages of marriage. The first speech of Lysias illustrates conditions which, though not necessarily those of the average Athenian, may well have been what the average Athenian aspired to. The speech was delivered by Euphiletos, who was accused of killing Eratosthenes. Euphiletos said that he had taken Eratosthenes in adultery with his wife. Evidently the marriage had taken place only a few years previously, for the child was still an infant. Euphiletos was a man of moderate means, for he possessed a house of two stories and some land, but he was not rich, for he went to work in the fields each day. His wife did not go out of the house, except to attend festivals. A female slave lived in the house and went to market for everyday purchases. It is noteworthy that Euphiletos, on marrying, did not take his wife to live with his relatives in a large house; he preferred the nuclear family as a residential unit to the extended family. If the circumstances of Euphiletos illustrate the ideal entertained by the Athenians, it is likely that a man waited, before marrying, until he had amassed enough economic resources to live independently of his relatives. In similar circumstances the parents of a daughter tried to give her in marriage at an early age. Since the function of a female citizen was to give birth to citizens, she was an unproductive consumer as long as she stayed in her parental house. To bring up numerous daughters was an indication of wealth and pride.[20]

IV

Before considering how a young Athenian came of age and acquired the status of an active citizen, it is necessary to notice the traditional subdivisions of the body of citizens, since these subdivisions played a part in marriage and the rearing of children. As is well known, in the last years of the sixth century Kleisthenes divided the Athenians into 139 demes and distributed these to form ten new *phylai*. This organization served henceforth for public purposes. But an older mode of organization, in which the effective

units were the *genos* and the *phratria,* survived and continued to play a large part in the life of the family.

The origin of the phratry is obscure, but a theory on the following lines can well be defended and has come to be widely accepted.[21] Each *genos* arose as a powerful family, or perhaps a small group of powerful families, or even as a powerful group of men held together by a fiction of common ancestry. In the insecure conditions of the Greek dark ages, when public authority was too weak to afford safety, poor and humble men entrusted themselves to the protection of a *genos*. It may well be imagined that the *genos* gave its dependents economic help and a safeguard against arbitrary violence; in return, the dependents furnished the *genos* with labor of all kinds, including armed labor. The ties thus contracted were hereditary. *Phratria* was the term which the *genos* gave to its dependents collectively. It may have originated as a gesture of courtesy; members of the *genos* honored their dependents by calling them their "brothers" (*phrateres, phratores*). By the fourth century any political privileges which members of the *genē* may once have held had been lost, but some *genē* at least continued to enjoy social prestige. Some regulations of the phratry called Dekeleieis, inscribed in and after 396, show that the *genos* of the Demotionidai continued to hold a position of honor within the phratry. Aischines (2.147) boasted that his father belonged to the phratry which shared the same altars with the Eteoboutadai. The speaker of Isaios 7 claimed the estate of Apollodoros as his adoptive son; he told how at the festival of the Thargelia Apollodoros "led me into the presence of the members of his *genos* and of his *phratria* to the altars" (7.15). The phrase implies that the same altars served both the *genos* and the *phratria.* The speech *Against Neaira* tells how Phrastor tried to have his putative son accepted into membership of his phratry and in his *genos*.[22] These sources, though scanty and scattered, suggest uniformly that in each case the *genos* stood to the phratry in a close relationship of a kind which might reflect an earlier condition of dominance.

If the normal pattern from which the phratry arose was that of a multitude of humble men who became hereditary dependents of a powerful family, there may have been variations on this pattern. Possibly in some cases two *genē* dominated a single phratry, and in others members of a single *genos* had a leading role in two phratries. In view of the large extent of territory controlled from Athens and the length of time through which its institutions devel-

oped before the classical age, there are likely to have been large differences. Possibly in some cases a phratry came into being without a *genos* to draw it together; for example, when Peisistratos and his sons maintained relatively secure conditions, some humble men may have banded together for social organization and mutual support on the model of the phratries which they could see around them. If phratries appear somewhat uniform in the fourth century, the appearance may be due to the late and scanty character of the evidence.

Was every citizen a member of a phratry? Several pieces of evidence suggest that he was. Decrees granting Athenian citizenship to aliens regularly authorize the honorand to choose his deme and his phratry.[23] The Sokrates of Plato (*Euthydemos* 302c–d) says that the Athenians have Apollo Patroios, Zeus Herkeios and Phratrios, and Athena Phratria. The law of Drakon on homicide, as reinscribed in 409/8, provided that the involuntary killer could be admitted to *aidesis* by the relatives of the victim or, if there were no relatives alive, by ten members of his phratry chosen according to worth.[24] This evidence is not fully conclusive. The remark of Sokrates may be imprecise. It is conceivable that there were citizens who were not members of any phratry, though no example can be cited. At least the evidence shows that the typical citizen belonged to a phratry. As the provision in the Drakontian law suggests, in the insecure conditions of the early period any Athenian who lacked an organization to protect him was highly vulnerable.

The phratry played a part in the most important events of the life of the family. When a man took a wife, he offered a sacrifice, the *gamēlia,* and invited the members of his phratry to take part. It will be remembered that an Athenian sacrifice was not only an offering to a god but also a festivity for the human participants. On the tenth day after the birth of a child the father held a sacrifice (*dekatē*) and gave the child a name, although this celebration was probably on a smaller scale, with no general invitation to the members of the phratry. On two occasions as the child grew the father offered sacrifices, the *meion* and the *koureion,* at the Apatouria with the members of his phratry participating; perhaps the *meion* was offered when the child was an infant and the *koureion* at or near puberty. Finally, the father introduced his son formally to the phratry. On this occasion the father swore to the child's parentage, there was opportunity for challenge and argument, and the members of the phratry voted, adding the son to their list if they were satisfied of his descent. In some phratries the formal introduction

took place at the same time as the *koureion,* but in 396 the Dekeleieis adopted a rule whereby the introduction was to take place at the Apatouria a year after the *koureion.*[25]

Although, as just indicated, the *phrateres* participated at many stages in the life of the family, a vote was taken and a name was added to a list at only one of these stages, namely, when the son was introduced formally to the phratry. The reforms of Kleisthenes had added a new civic organization, comprising demes, *trittyes,* and ten new *phylai,* to the old structure. In the new organization there were social and religious celebrations, to be distinguished from formal registration, and perhaps little care was taken to exclude unauthorized participants from the merely social and religious celebrations. Boiotos as a child lived in the house of his mother's brothers, since his father, Mantias, was reluctant to acknowledge him, and he took part in choral festivities of their *phylē,* Hippothontis. On coming of age he compelled Mantias to acknowledge him by opening legal proceedings, and so he became a member of the *phylē* Akamantis.[26]

The decisive stage in the admission of a son to the body of citizens came when he was (probably) in his eighteenth year and was introduced by his father to his deme.[27] When a father presented his son to his deme, the demesmen voted on two questions. The first was whether the son had reached the prescribed age. If the vote on this question was negative, the candidate remained among children until a later year. The second question was whether the child was "free and born according to the laws." If the demesmen voted that he was not free, the applicant took his case to a court. If the court found that the son was not entitled to registration in the deme, the city sold him into slavery.[28] But if the court found for the applicant, the demesmen were compelled to add him to their list. After the procedure of registration had thus been completed, the council of five hundred scrutinized those newly admitted. If it found that any one of them was below the prescribed age, it punished the demesmen who had admitted him. Finally, the young men entered on two years of training as *ephēboi* and their first parade took place at the beginning of Boedromion, the third month of the Attic year.[29]

Thus a young man's claim to inherit citizenship was subjected to scrutiny and vote on two occasions, namely, when he was introduced to his phratry and when he was introduced to his deme. Even so, there may have been some imprecision in procedure and some improper enrollment. When the adoptive son of Apollodoros

defended his title to the estate, he told how Apollodoros introduced him to the phratry and he commented on the care which its members took: "Among them the rules of procedure demand such a high degree of exactitude."[30] The comment suggests that some phratries may have been less careful. The conduct of Euktemon in his old age is more revealing. He introduced a son of his freedwoman, Alke, to his phratry. When Philoktemon, Euktemon's son by his wife, objected, Euktemon induced him to desist by intimidation. A compromise was reached. The son of Alke was enrolled in the phratry but received only one farm as his share of the estate.[31] In 346/45 the Athenians carried out a revision of the list of citizens;[32] evidently they believed that some people had had themselves enrolled in demes although they were not entitled to citizenship.

V

The relation of women to the deme and the phratry was different. Passages in three court speeches require attention.

1. Isaios 8, *On the estate of Kiron*. Kiron had died leaving no surviving sons. The speaker of the extant speech claimed the estate, maintaining that his mother was the daughter of Kiron. His opponent claimed the estate on the grounds that his own father was the brother of Kiron. One of the arguments offered by the opponent alleged that the mother of the speaker was not the daughter of Kiron. The speaker devoted part of his speech (8.6–29) to rebutting this argument. He offered circumstantial evidence to show that his mother was the daughter of Kiron. In the course of the rebuttal he mentioned phratries twice (8.18–19): he said that his father, on marrying the speaker's mother, provided the *gamēlia* for the members of his phratry, and he said that he himself was introduced formally by his own father to the latter's phratry. But he did not say that his mother had been introduced formally to any phratry for enrollment.

2. Demosthenes 57, *Against Euboulides*. In 346/45 the lists of citizens were revised by means of inquiries held in the demes. The fellow-demesmen of the speaker of this speech denied his citizenship by the vote of a majority. The case was brought before a court, where this speech was delivered. At 57.18–30 the speaker rebuts the allegation that his father was not a citizen. The witnesses

whom he produces to attest his father's citizenship are first the father's surviving relatives (57.20–22) and then some members of the father's phratry, *genos,* and deme (57.23). At 57.30–45 the speaker rebuts the allegation that his mother was not a citizen. The witnesses whom he produces to attest his mother's citizenship are her surviving relatives (57.37–39). At 57.40 the fellow *phrateres* and fellow demesmen of the mother's relatives attest something on oath, and the content of the oath appears in a later passage of the speech, at 57.67–69. There the speaker resumes his arguments briefly as he approaches a close. He says, first, that the relatives, fellow *phrateres,* and fellow demesmen of his father attest the identity of his father (57.67); then, that the relatives of his mother attest the identity of his mother (57.68); and finally, that the fellow *phrateres* and fellow demesmen of the mother's relatives attest that the latter are indeed relatives of the mother. That is, the sworn testimony of the fellow *phrateres* and fellow demesmen of the mother's relatives at 57.40 merely attested that the alleged relatives of the mother were indeed her relatives.

In short, fellow *phrateres* attested that the speaker's father was a member of the phratry and therefore a citizen. But there was no testimony to the effect that the speaker's mother was a member of a phratry. Silence of similar import appears in two further passages of the speech. At 57.41 the speaker says that his father took his mother in marriage by the procedure called *engyēsis;* he does not say that his father introduced her to his phratry. At 57.43 the speaker says that in a previous marriage his mother gave birth to a daughter and later the daughter was given in marriage; he does not say that the daughter was enrolled in a phratry.

The conclusion to be drawn from these two speeches is clear. If citizenship or a claim to inheritance was challenged by arguments bearing on the status of a man, one could adduce the man's membership in a phratry as proof of his status. But if the arguments bore on the status of a woman, one did not adduce the woman's membership in a phratry as proof of her status. It seems to follow that women were not enrolled in phratries; they were neither introduced as daughters to their father's phratry nor as brides to their husband's phratry.[33] But a difficulty arises from a passage in another speech.

3. Isaios 3, *On the estate of Pyrrhos.* Pyrrhos, having no sons, adopted Endios, one of the two sons of his sister. When Pyrrhos died, Endios succeeded to the estate and enjoyed it for twenty years. When

Endios died, two claimants presented themselves. One of them was the sister of Pyrrhos and mother of Endios. She was represented by her surviving son, who spoke the extant speech. The other was Phile, who said that she was the daughter of Pyrrhos. She was represented by her husband, Xenokles. The case depended on the paternity of Phile and consequently on the nature of the union between Pyrrhos and the mother of Phile. Xenokles said that the mother of Phile had been given in marriage to Pyrrhos and so Phile was his daughter. The speaker of the extant speech said that the mother of Phile had been prostituted indiscriminately and so there could be no certainty about the paternity of her daughter.

The general ideas illustrated by the dispute will call for attention shortly. Here only one argument uttered by the speaker calls for note. At 3.73–76 he says that, if Pyrrhos had married the mother of Phile, he could have introduced Phile as his daughter to the phratry. At his death, the speaker continues, Pyrrhos would then have left Phile as *epiklēros,* to be given with the estate to the nearest male relative so that she could bear an heir to the estate. But instead of doing so Pyrrhos adopted Endios and in this way, the speaker concludes, Pyrrhos declared Phile to be spurious. The speaker presents evidence from the *phrateres* to show that Pyrrhos did not offer the *gamēlia* and that he did not introduce Phile to the phratry, although allegedly the law of that phratry would have required it.

At first sight this argument suggests that daughters could be recognized as members of their father's phratry. Yet the possibility is presented only in a hypothetical way and the speaker does not dwell on it, as he might be expected to do if this argument were decisive. Moreover, he says nothing more than that Pyrrhos might have "introduced" Phile to the phratry. He does not say that the *phrateres* could have taken a vote about admitting her or that she could have been added to their list. It should be borne in mind that phratries may have varied in their customs. The argument of Isaios 3.73–76 does not necessarily show anything more than that in some phratries a father could take his daughter with him to some of the ceremonial gatherings. The suggestion derived from a first reading of this argument does not outweigh the conclusion drawn from the other two speeches (Isaios 8 and Demosthenes 57): women were not recorded in the lists of members of phratries.

Women were not included in the lists of members kept by the demes. Their absence is indicated in the opening questions asked,

according to Aristotle (*AP.* 55.3), when men chosen to the nine archonships were scrutinized for formal qualifications. Each man undergoing scrutiny was required to state the name and deme of his father, the name of his father's father, the name of his mother, and the name and deme of his mother's father. The deme of the mother was not asked, because she did not belong to a deme. Wives of members of a deme could choose from among themselves women to officiate at women's festivals celebrated by the deme,[34] but a woman's relation to the deme was the indirect connection through her husband.

VI

The institution determining the relation of the standard Athenian citizen to women was marriage.[35] Two forms of marriage were current in classical Athens. One of these was in full ἐγγύησις (ἐγγύη) καὶ ἔκδοσις. Since the first of the two parts of the procedure was more important, this form can be called briefly *engyēsis*. The word *engyēsis* and the corresponding verb *engyan* can sometimes be rendered by "pledge" or "promise" or "entrust"; often they are best left untranslated. *Engyēsis* was an oral contract made between the woman's *kyrios* and the prospective husband in the presence of witnesses. It could be revoked if *ekdosis* had not followed, but it was more than a betrothal, since it contributed to transferring *kyrieia* over the woman from her erstwhile *kyrios* to the prospective husband.[36] *Engyēsis* included an agreement about dowry (προῖξ). The dowry should be distinguished from any paraphernalia assigned to the woman for her personal use, even though these could be valuable. The dowry was an amount of money or valuables intended for the upkeep of the woman. If the marriage came to an end through dissolution, the dowry reverted with the woman to her family of origin. The dowry had to be assessed in money, even if it did not consist of money, for otherwise the woman's original family could not reclaim it if the marriage was dissolved.[37] *Ekdosis,* which followed some time after the contract had been made, was the transfer of the woman from her household of origin to that of her husband.

The employment of the verb *engyan* reveals the way in which marriage of this kind was regarded. The same verb was used for the procedure whereby a creditor accepted the assurance of a guar-

antor for the payment of a debt. The creditor was said to "entrust" (ἐγγυᾶν) the debtor to the guarantor; participially the creditor was expressed in the active (ὁ ἐγγυῶν), the guarantor in the middle (ὁ ἐγγυώμενος), and the debtor in the passive (ὁ ἐγγυηθείς). The guarantor took charge of the debtor but kept him at the creditor's eventual disposal, if the debt should not be repaid. In marriage the woman's erstwhile *kyrios* "entrusted" her to the bridegroom; participially her erstwhile *kyrios* was expressed in the active, the bridegroom in the middle, and the woman in the passive.[38] She was treated not as a person participating in the transaction but as its passive object. Moreover, marriage did not have the finality to which it aspires in some other systems of law. Marriage did not create a new community. Instead it entrusted the woman to the bridegroom for the large but not necessarily unlimited purpose of bearing heirs to his property. The rights and obligations of the woman's erstwhile *kyrios* did not come to an irrevocable end. They became dormant, but they could be revived if the marriage was brought to an end through dissolution or in some cases through death of the husband.

The other form of marriage current in classical Athens was *epidikasia*. It applied if a man died intestate leaving a daughter (or daughters) but no sons. His nearest relatives in a fixed order were required to take the estate and to take the daughters as their wives. The archon adjudged (*epidikazein*) the estate and the woman to the claimant. If a dispute arose among different relatives as claimants, the matter was brought before a court for decision. The woman was said to be *epiklēros* and remained so all her life.[39] The man who took an *epiklēros* by *epidikasia* could not alienate the property which thus came into his hands. On the contrary, it passed to the sons of himself and of the *epiklēros* when the sons were two years beyond puberty.[40] By the age of the orators *epidikasia* of an *epiklēros* was becoming infrequent. Fathers who had no sons preferred to provide for their daughters and their property by giving or bequeathing both to heirs. The father adopted the heir as his son at the same time. The relevant law said that a father who lacked sons could only give or bequeath his property if he gave his daughter(s) with it.[41] This law shows the same concern for keeping the property and the woman, the prospective mother of heirs, together as do the rules about the *epiklēros*.

Marriage by *engyēsis* and marriage by the *epidikasia* of an *epiklēros* formed unions which had equal validity.[42] Yet the two kinds of union were wholly disparate in their nature and their

purposes. *Engyēsis* entrusted a woman to a man for the purpose of providing heirs to the man's property, and a dowry accompanied the transaction for the sake of the woman's subsistence. *Epidikasia* of an *epiklēros* brought in a man to manage the property of the deceased and to beget heirs to that property; when the heirs at last took over the property, they were required to provide subsistence for their mother,[43] but no question of dowry could arise. The two procedures do not have any common element which might be considered the essence of the marital union. The point can be clarified by a contrast. The procedure of marriage today varies in different municipal systems of law, but many of them require the joint consent of the prospective husband and of the prospective wife as the central constitutive element, this principle being derived from Roman law.[44] There is no central constitutive element common to *engyēsis* and to the *epidikasia* of an *epiklēros*.

This conclusion should be borne in mind when one considers unions of a less solemn kind. The extant speeches of the Athenian orators mention occasionally a "concubine" (*pallakē*).[45] It appears that a family could give a daughter into concubinage and make stipulations for her support; there was neither a contract of *engyēsis* nor a dowry. It also appears that in some circumstances the law protected a man's relation to his concubine as carefully as it protected his relation to his wife. Concubinage is only rarely mentioned in extant speeches, but there is a reason for the rarity. Those speeches which offer information about marriage mostly arise from disputes about inheritance, and if a dispute arose because there was doubt about the nature of the union between one claimant's parents, usually that claimant tried to show that the parents had been united in the most solemn form of union, *engyēsis,* but the other tried to show that the mother was a common prostitute. The dispute about the estate of Pyrrhos (Isaios 3; page 18 above) was of this kind. One party tried to show that the mother of Phile had been married to Pyrrhos by *engyēsis,* but the other alleged that she had been prostituted indiscriminately. One may guess that she was united to Pyrrhos by a relatively lasting type of concubinage, but it was not in the interests of either party to the dispute to say so.

The term *pallakē* was probably as imprecise as the English phrase "kept woman." The conditions on which women were given into concubinage may have varied greatly. An economic consideration suggests that Athenian women were often given into concubinage. The dowry or, strictly speaking, the promise of a dowry

was a characteristic item in a contract of *engyēsis*. Athenians gave dowries which were large in proportion to their means.[46] But one could only give a dowry if one had some property to give. Men of substance, the 9,000 who were found to own at least 2,000 drachmas in 322 could give dowries, but more than half of the citizens were excluded by that property qualification. If a family was impoverished or destitute, surely the best that it could do for its daughters or sisters was to give them into concubinage and bargain over stipulations for their support.

The question accordingly arises, what was the status of a son born to a male citizen and to a woman who was a citizen but was not united to him by *engyēsis* or *epidikasia*. Did the son inherit citizenship and a right to (a share of) his father's estate? Many historians have supposed that a son of this kind was *nothos* as opposed to *gnēsios*, terms which have been translated as "illegitimate" and "legitimate." There is adequate evidence that in the fourth century a *nothos* had no right of succession to property.[47] Some historians have maintained that the son of a male citizen and his citizen-concubine was *nothos* and could not succeed to property but had citizenship;[48] others have denied this. The present writer has defended elsewhere a solution which says that the Athenians allowed a son to inherit property and citizenship if and only if they were convinced of the identity of his parents as citizens.[49] If a son's right to succession and citizenship were challenged, he would usually try to show that his parents were united by *engyēsis*, because a union of that kind provided strong evidence of the identity of the son's parents. But *engyēsis* did not confer legitimacy on the union and its offspring, in the way that marriage contracted before a public officer and manifesting joint consent as the constitutive element confers legitimacy in many modern systems of law. If the parents were united in a less solemn union, if, for example, the father had taken the mother as his *pallakē* (concubine, or kept woman), the son might still be entitled to (his share in) the inheritance and to citizenship, provided that he could establish the identity of his parents. Such a son was not, on this view, *nothos*. A child was *nothos* only if there were grounds to dispute his parentage. The terms *gnēsios* and *nothos* should be rendered, not as "legitimate" and "illegitimate," but as "true" and "spurious."

If this solution is right, it follows that one can scarcely speak of "marriage" in Athens. Men took women as their partners. If the woman's family of origin had at least moderate means, the union was likely to be initiated by a contract of *engyēsis* and a dowry

would be provided. But if the woman's original family was too poor to dower her, she was likely to be given into concubinage.[50] The consequent union was less secure, since the husband did not have to refund a dowry if he repudiated the woman. But the status of the children depended solely on the identity of the actual parents. The modern concept of a union which is unlawful, even though it may be lasting, a concept which has imposed disabilities and sometimes suffering on bastards, was foreign to the Athenians.

VII

The son of Athenian parents inherited citizenship as well as (a share in) the property. A daughter too inherited citizenship, but her citizenship was of a latent kind; it consisted essentially in the capacity to give birth to sons who would be citizens. Citizenship and right of succession to property were transmitted together, because in Athens as in many Greek states only citizens could own immovable property. Resident aliens could not own "land and house" in the Athenian phrase, unless that privilege were granted to them individually by decree.[51]

Only a little need be said here about the history of Athenian citizenship, mainly to recognize clarification achieved in some recent studies. In 451/50 the Athenians resolved that henceforth a child should have citizenship only if both its parents were citizens. This requirement was relaxed in the later years of the Peloponnesian War, but it was renewed in 403/2 on the motion of Nikomenes. The decree of Nikomenes provided that no inquiry should be held with a view to enforcing the same rule on children born before 403/2. Whether the measure of 451/50 had a similar provision against retroactive enforcement can only be conjectured. In 403/2 another measure, proposed by Aristophon, provided that the children of a male citizen and a female alien should be *nothoi*. It is uncertain whether such a provision had figured in the measure of 451/50, since reports on that measure are brief.[52]

The law of 451/50 stated the parental condition to be fulfilled if the child was to be a citizen. It is not known what rule there was on this matter previously. The easiest hypothesis is that no rule had been reduced to writing. That is, the acceptance of a son by the phratry and the deme would depend on the custom of that phratry and that deme and on the influence of the father. The passage of

the law of 451/50 implies that previously some children at least of mixed marriages had been accepted as citizens. A few prominent men of the sixth and early fifth century are known to have taken foreign wives.[53] Toward the middle of the fifth century the growing prosperity of Athens probably attracted alien settlers, and some of them, like Kephalos (page 8 above), may have become rich. Intermarriage was likely to occur in many ranks of society. It has lately been observed that the law of 451/50 benefited Athenian fathers when they sought husbands for their daughters.[54] If the children of a mixed marriage were to suffer the disabilities of metic status, including payment of the *metoikion* and incapacity to own immovable property, the daughter of an Athenian father had less competition to fear from the daughters of resident aliens. This consideration goes far to explain both the original passage of the law and the reasons why it was reenacted in 403/2 and upheld thereafter.

The mixed marriages known from the sixth and early fifth century united male Athenians to female aliens. No cases are known where female citizens were given in marriage to male aliens, but the lack of attested cases of this kind can be explained by the facts that extant sources tell more about Athens than about other cities and more about men than about women. What was the status of a child whose mother was a citizen and his father was an alien resident in Athens? There is no evidence to answer this question. If no rule was laid down before 451/50, it is not unlikely that an Athenian father could give his daughter to a resident alien and hope to persuade his phratry and his deme to accept the consequent grandson. It has accordingly been remarked that the Athenians lost heavily in the Egyptian disaster of 454. A modest estimate puts the loss of citizens at about 8,000. Loss of aliens in the crews in Egypt would surely include loss of aliens domiciled in Athens. So from 454 until 451 an Athenian father, seeking a husband for his daughter, had to face not only competition from metic daughters but also a shortage of eligible men. This consideration may explain why the law of 451/50 was passed neither earlier nor later but a few years after the Egyptian disaster.[55]

The measure restricting citizenship to children whose parents were both citizens sprang thus from practical considerations, which can be discerned in part, not from pride in purity of descent. Admittedly Athenians told stories expressing pride in their supposed origin. They professed to be autochthonous, and like all Ionians they claimed descent from Ion. But the reason for making descent the criterion for citizenship was more political. In the archaic pe-

riod status within the community had depended on wealth as recognized in the "Solonian" property-classes. In the second century B.C. and later citizenship was granted to foreigners as a reward for services, including financial services, to Athens. Wealth and public services as the bases for juridical status had their champions in the classical period, and the conflicting claims aroused controversy and strife. Descent as the criterion of citizenship was the most widely acceptable compromise among the competing forces.[56]

VIII

Some picture of the standard citizen—in his relation to metics and slaves, to his phratry and his deme, and to women and children—begins to emerge from the preceding sections. A little more can be learned about him by studying the law of inheritance. The speeches in which Demosthenes prosecuted his guardians reveal a significant distinction between two words, *oikia* and *oikos*. *Oikia* in the speeches means "dwelling-house." The *oikia* in which the elder Demosthenes had lived with his wife and children was occupied under the terms of the will by Aphobos and later ceded to the younger Demosthenes.[57] But *oikos* in these speeches means the whole estate left by the elder Demosthenes. The word occurs often in phrases mentioning the possibility of leasing the estate or part of it to tenants in order to draw income from them.[58] The wife of the elder Demosthenes is said to have brought a dowry of fifty minai "into the *oikos*."[59] An *oikos* can be burdened with a liturgy, with the property-tax (*eisphora*), or with a debt due to the state.[60] Allusions are made to *oikoi* worth one talent, two talents, and fifteen talents.[61]

In short, the *oikos* in Attic usage is what has been called in a different system of law an *universitas iuris,* that is, "a collection of rights and duties united by the single circumstance of their having belonged at one time to some one person."[62] But it is to be noted that the Athenians conceived this collection, not in terms of rights and duties, but in a more concrete way. *Oikos* is patently related to *oikia*. In earlier Greek *oikos* means "house." Near the opening of the *Politics* (1.1252a24–1252b27) Aristotle discusses the *oikia* as the first element in the *polis*. Although his normal word is *oikia,* he uses *oikos* interchangeably with it in this discussion (1252b14, cf. 1255b19), and he quotes the line of Hesiod (*Works* 405) bidding the prospective farmer first procure an *oikos*. In writing of the

oikia Aristotle has in mind not so much the material structure as the people dwelling in it; for he recognizes the relationships of male and female and of master and slave, and says: "The primary *oikia* arises from these two relationships."[63]

The Athenian law of intestate succession and the provisions concerning adoption and bequest had the aim of ensuring that the *oikos* of the deceased or of the man looking ahead to his death should not become "empty." The risk that the estate might become empty is lamented in speeches about disputed inheritances.[64] An *oikos* was empty if it did not have a man to defend it, to care for its sources of revenue, including land, and to perform the fiscal obligations incumbent on it.

The law of intestate succession provided that the estate should pass to the sons of the deceased in equal shares.[65] A daughter had no capacity for succession, but her brothers inherited the obligation to dower her.[66] If the deceased left no sons, his estate passed to his collaterals in the following order:[67]

1. It passed first to his brothers begotten by the same father and to sons of those brothers.
2. If there were no relatives of type 1, it passed to sisters begotten by the same father and to their children.
3. If there were no relatives of types 1 or 2, it passed to the cousins of the deceased on his father's side and to the sons of those cousins.
4. If there were no relatives of types 1, 2, or 3, it passed to the relatives of the deceased on his mother's side in the same order.

Athenian law recognized family relationship as far as cousins and sons of cousins, and relatives as far as this degree were called *anchisteis*. The law of homicide required relatives of the victim as far as that degree to join in the initial proclamation against the killer.[68] The law of intestate succession did not provide for the estate to pass to ascendants. Indeed, to the student of early Roman law the Athenian rules on intestate succession seem remarkably modern. The Twelve Tables (5.4–5, cf. 5.6–7) recognize only agnatic relatives as capable of inheriting, if there is no will, and they provide that, where there are no agnates, the estate shall pass to the *gentiles* of the deceased. No provisions to this effect are attested among the Athenians.

Testamentary succession was regulated by a law which was attributed to Solon and read thus:

> Concerning those who had not been adopted, so as neither to disclaim or claim the inheritance, when Solon entered into office, let a man be free to bequeathe his property as he wishes, provided that there are no true male sons, and provided that he does not act on account of insanity or senility or incantations or sickness, or in response to the persuasion of a woman, being out of his mind for any of these reasons or subject to constraint or tied up.[69]

As is well known, the orators attributed to Solon many laws which, though current in their own time, were not part of his work (cf. page 116 below), but this law has a good chance of being authentic, since it mentioned Solon's entry into office as a terminal date. The law put three restrictions on freedom of bequest and assumed that the Athenians knew how to bequeath property. Thus the law of Solon did not introduce the practice of bequest but regulated a practice already current. Likewise in its opening clause it implied that adoption was already practiced and recognized.[70]

Each of the three restrictions calls for note. The last, "on account of insanity or senility . . . or tied up," requires little attention. This clause, or at least some of the grounds it stated for challenging a will, were repealed by the Thirty to prevent malicious litigation, but it was restored in full after their overthrow.[71] The first of the restrictions denied authority to make a will to sons who had been adopted before Solon took office. This restriction was extended to all adoptive sons. The adoptive son was expected to beget an heir to the estate of his adoptive father.[72] Likewise, if the testator left a daughter but no sons, the heir was required to marry the daughter, and the law prohibited him from taking the property without taking the daughter.[73] It is evident that the lawgiver's aim was to ensure that *oikoi,* together with encumbrances on them such as daughters, should not be left empty of a man to take care of them.

The remaining restriction in the Solonian law allowed freedom of bequest only if there were no sons. This was relaxed, and one of the steps toward relaxing it can be discovered. Athenian wills were often made when the testator was approaching death.[74] A special problem arose if the sons were still minors when the father was about to die. To solve this problem, an explicit law of the Athenians provided that the will made by the father should be valid if the sons did not survive to the age of two years beyond puberty.[75]

In fact, Athenian fathers exercised large discretion to provide legacies in their wills, even if they had sons. The will of Konon set aside 5,000 staters for dedications to Athena and Apollo at Delphi. It assigned about 10,000 drachmas to Konon's nephew, who was serving as his treasurer in Cyprus. It gave three talents to his brother. Out of the total estate of forty talents only about seventeen talents remained for his son.[76] Yet it should be recognized that a fortune of seventeen talents was large. From the few Athenian wills known it appears that fathers made wills not in order to disinherit their sons but in order to make provision for the welfare of these and other dependents. The elder Demosthenes left a widow, a son aged seven and a daughter aged five. His will entrusted the property and these persons into the care of three guardians, of whom two were relatives of the testator. Legacies were provided for the three guardians to induce them to care for the interests of the wards. One of them was instructed to marry the widow and another to marry the daughter when she should be old enough.[77] If, as the younger Demosthenes asserted later, these best-laid plans went agley, it was not through any fault of the testator or of the laws. If an Athenian father had made a will to disinherit his sons, it is not clear what remedy they might have had. Perhaps they could have challenged the will on the grounds that the testator had made it on account of insanity or senility or one of the other conditions specified in the last of the three restrictions noted above.

The speaker of Isaios 7, claiming the estate of Apollodoros as his adoptive son, urged the court to uphold the *gnomē* of his adoptive father (7.41). *Gnomē,* a word of wide currency, can best be understood here as "reasoned intention." The Athenian law concerning wills, like the law of intestate succession, is remarkably modern or, to be more precise, remarkably individualistic. It seeks to realize the reasoned intention of the testator. It is free of the formalities which a student of Roman law might expect. Witnesses were present when a will was drawn up, but they served solely to attest that the document was indeed what the testator intended, and no specific number of witnesses is known to have been required. The Athenian law of inheritance does not reveal any residual traces of a condition in which property in general, or even land in particular, could not be alienated outside the family. Athenian smallholders, like agrarian people in many places, were reluctant to part with their land, but this reluctance was due not to any legal obstacle that can be discerned but to good economic reasons.

To put the matter another way, the Athenian community, as revealed by laws of inheritance current in the fourth century and traceable in part to the time before Solon, was a community of individual persons, each person being an adult male citizen. It was not a community of families, where each family might have its mortal head as its transitory representative but persist, under a new head, after his death just as it had existed before his time. Possibly such a condition had once existed, but if so, it perished at an early stage without leaving any trace. The care, which Athenian law and Athenian citizens took to ensure that the *oikos* of a deceased person did not become empty, sprang, not from any concern for the family as an immortal corporation, but from pragmatic considerations about providing for dependents and for fulfillment of fiscal obligations. Likewise, the *patria potestas,* which the early Roman exercised over his sons, is foreign to Athenian law.[78] Once the Athenian son came of age and was enrolled in his phratry and his deme, he had the full rights and obligations of a citizen.

It may well be imagined that long before, in the age of migration, many people had settled in Attica, not as individual pioneers, but as groups, each group being led by a chieftain, and that with the passage of time such groups had crystallized as *genē.* Indeed a legend attested in the high classical period illustrates such a process. The Gephyraioi, according to their own account, originated from Eretria. When they migrated to Attica, the Athenians accepted them to be citizens on specific terms and allowed them all the privileges of citizenship except for a few insignificant matters. Their migration lay so far back in the past that Herodotos (5.57), reporting the story, could add his own belief that the Gephyraioi were originally Phoenicians and came to Attica not from Eretria but from the neighborhood of Tanagra. It is instructive to compare this story with a Roman legend of migration. In the sixth year after the expulsion of Tarquin the Proud, the Claudian *gens,* led by its headman Atta Clausus and bringing a large body of dependents, migrated from Sabine territory to Rome and received land to settle on.[79] The Athenian story reflects a less hierarchical and more egalitarian conception of society. Any body of dependents who may have accompanied the Gephyraioi in their migration has been forgotten. So has their Atta Clausus; the headman who presumably led them to Athens is not named. The Athenians thought of their city as a community of equals, and however far this conception may have differed from socioeconomic reality, it determined their laws.

IX

It is now possible to give some account of the standard citizen. He is a small-holder, and his ownership of land, however modest in scale, gives him a sense of independence. He has the most privileged condition among the inhabitants of Attica. He is juridically superior to metics and slaves. Small-holders constitute less than half of the body of citizens. Adult male citizens exercise the rights which are still potential in minors of his status and merely latent in women. The standard citizen inherits property and manages it, hoping to increase it. He is deterred from parting with his property, not by any legal obstacle, but by considerations of economy and shame. When he marries a wife, she brings a dowry, which he will manage along with his other property, and in return he accepts the obligation of maintaining her. He takes part regularly in festive celebrations of his phratry, which have a bearing on his marriage and the birth and maturity of his children. If he has a daughter, he will try to find her a good husband, when she reaches marriageable age, and he will dower her. He hopes that his wife will bear him sons and that at least one of them will come of age before he dies. If these hopes are not fulfilled when he finds death near, he makes a will or adopts a son, preferably from among his relatives.[80] In looking ahead to his death, he tries to ensure that his estate will not be left empty of a man to maintain it and to care for its dependents.

The relation of the citizen to his household can be clarified further by noting some features of the law of theft and the law of adultery. For some kinds of theft the law provided a private action (*dikē*), and if the defendant was convicted, he was condemned to pay a fine. But if the owner within his own house took the thief in the act, the consequences were more severe. If the theft took place by day and the object stolen was worth fifty drachmas or more, the owner had recourse to the procedure called *apagōgē*. That is, he led the thief away to the Eleven, the police officials in charge of the prison, and if the accused person confessed, they put him to death, but if he denied guilt, they put him before a court with the prospect of the death penalty on conviction. If the theft took place by night, then whatever the value of the object stolen from the house, the owner could kill or wound the thief or have recourse to *apagōgē* with the same consequences as for theft by day. The special protection thus accorded to the contents of the house against theft is a relic of an earlier condition, when the householder could have re-

course to self-help in defense of his house. *Apagōgē* arose when the state intruded with modesty into the sphere of private retaliation.[81] Similarly the law on adultery allowed the husband recourse to *apagōgē* with the prospect of the death penalty for the convicted adulterer, for adultery was regarded as a violation of the house.[82]

In the classical law on theft and adultery the house appears as a place enjoying special protection. The relatively summary procedure of *apagōgē* and the provision for the death penalty show that the special protection had arisen from the self-help of an earlier age. So with only a little imagination one may suppose that at that early time John Doe and Richard Roe each had his own house, and if Doe found Roe in Doe's house without invitation, Roe had committed an outrage and Doe was entitled to retaliate without restriction. But if Doe and Roe met in the open space outside both houses, they were in a place which may at first have been no-man's-land. No outrage had been committed, and although Doe and Roe might distrust one another, they might also negotiate with one another and perhaps reach an agreement. As time passed, public authority intruded step by step into no-man's-land by trying to maintain the peace. Public authority had a great deal of success in this endeavor. The story of the process is the story of the growth of law (chapter 3) and above all of the sanctions by which the courts upheld the law (chapter 4). But public authority ceased at the threshold of the citizen's house. Even in the fourth century one needed a special decree in order to enter a private house for police purposes.[83]

3
The Sources of Law

ex non scripto ius venit, quod usus comprobavit. nam diuturni mores consensu utentium comprobati legem imitantur.
—Justinian, *Institutes,* 1.2.9

In many modern states a distinction is drawn between the constitution, or "fundamental law" as it is called in some countries, and the laws. Both the laws and the provisions of the constitution are upheld by the courts; both are sources of law. But the distinction has two salient features. First, the constitution has greater authority than the laws. Therefore, if a law is shown to contravene a provision of the constitution, it is declared invalid by a court. Second, the procedure for changing the constitution, whether by adding to it or by canceling some of its provisions, is slower and more difficult than the procedure for changing the laws.

In Athens in the fourth century a distinction was drawn between "laws" (*nomoi*) and "decrees" (*psēphismata*). Both laws and decrees were upheld by the courts. The oath sworn by judges (*dikastai*) began with the undertaking: "I will vote in accordance with the laws and the decrees of the people of Athens and of the council of five hundred."[1] The Athenian distinction had the same two salient features as the modern distinction. Laws had greater authority than decrees, and if a decree was shown to contravene a law or some laws, the decree was declared invalid by a court. The procedure for changing the laws, whether by adding to them or canceling some of them, was slower and more difficult than the procedure for passing or repealing decrees.

Prima facie the two distinctions are similar. This chapter will study Athenian law with a view to finding out whether the distinctions are the same or different. In this way it will try to discover

what the Athenians understood by law. Section I will look at theoretical views expressed in Athens on the types of content proper for laws and decrees respectively. Section II will consider the codification of the laws carried out in 403–399. Section III will review the procedures in force in the middle of the fourth century. Section IV will try to trace the concepts of law and decree backwards before 403. Section V will draw conclusions.

A preliminary observation about terms is in order. The English word "law" is ambiguous. It can mean a particular measure which has been ratified, as when people say that the legislature has passed a new law determining postal rates. On the other hand, "law" can mean a body of law, as when one speaks of "the law of landlord and tenant," "the Roman law of sale," or, even more generally, "Hindu law." Some languages have a separate word for law in the second sense (*ius, Recht, droit*). But since in any one community the sources of law (*ius*) are usually multiple, there is hardly ever a single word denoting all kinds of laws in the first sense (the Roman list of laws in this sense is especially long: *leges, plebiscita, senatus consulta, edicta magistratuum,* etc.). In fact, the ambiguity in the English word "law" does not often lead to misunderstanding, once it is recognized. Greater caution is needed in selecting English words for the two types of measures distinguished by the Athenians. In this chapter "laws" will be used for *nomoi* and "decrees" will be used for *psēphismata,* since it would be tedious to repeat the Greek words every time the things are mentioned. Thus for present purposes "law" can mean *nomos* or *ius*.

I

Aristotle and the author of the Pseudo-Platonic *Definitions* each distinguish the content proper for decrees from that proper for laws. The author of the *Definitions* (415b) says that a law is permanent, but a decree has only temporary validity. Aristotle in the *Nicomachean Ethics* (5.1137a31–1138a2) is more discursive. He distinguishes between two virtues: justice and equity. Whatever conforms to the laws is just. Yet the law, he continues, has to be stated in general terms, but every actual case is particular, not general. So apart from justice there is another virtue, equity, which can judge the particular case correctly. Likewise in the city, he adds, one requires not only laws but also decrees, and the latter

regulate particular cases. In the *Politics* (4.1292a4–7) Aristotle discusses different forms of *dēmokratia* and distinguishes one in which supreme authority resides, not in the law, but in the vote of a majority. This comes about when decrees, as opposed to law, are supreme. He adds (1292a32–37) that the law ought to determine all general matters and the magistracies ought to determine particular matters; this condition alone amounts to constitutional government (*politeia*). So if *dēmokratia* is a form of constitutional government, a condition in which everything is determined by decrees is not even *dēmokratia* properly speaking.

It is possible to put these observations together in the light of an Athenian provision, mentioned by Andokides (1.87) and others, that there should be no law about a single person, as opposed to all Athenians, unless it were passed by a secret vote with a quorum of 6,000. This provision makes it possible to interpret Aristotle's criterion of "particular" as referring to a named person or some named persons. One may then say that a topic for legislation was proper matter for a *nomos* if it was general and permanent, but it was proper matter for a decree if it was particular and permanent of if it was general but had only temporary validity or if it was particular and had only temporary validity.[2]

One can go further. In the fourth century new decrees were passed by a vote of the assembly of Athenian citizens, but new *nomoi* were ratified by a board of *nomothetai*. Because of this procedural difference, which will be studied in section III, it was possible to say which measures were *psēphismata* and which were *nomoi*. On the basis of known laws and decrees of the fourth century it has been argued that, once the distinct procedure for making laws had come into being, and except in the critical years of the final war against Philip II (340–338), the Athenians respected the distinction; that is, they did not make general rules of permanent validity in the form of decrees.[3]

Yet some hesitation may be in order. Neither the author of the *Definitions* nor Aristotle offers a discursive or systematic inquiry into the difference between laws and decrees. The former's remark is brief. In the passage in the *Ethics* Aristotle focuses his attention, not on laws and decrees, but on justice and equity, and he only mentions the political distinction incidentally to illustrate his point about the virtues. In the passage in the *Politics* the aim of his remarks is, not to specify the proper difference in content between laws and decrees, but to criticize a condition in which the vote of a majority overrides the laws. Neither author offers the type of dis-

cussion which could be expected if an orator were to expound a matter of law to an Athenian court.

To say this is not to deny all value to the remarks of the two authors. In view of Aristotle's habitual procedure in his ethical treatises, one may expect to find common Greek opinions presented in his writings, and sometimes one finds them discussed in an uncommon way. Since the Athenians in the fourth century had different procedures for passing decrees and for making laws, it should be presumed that they thought different types of content proper to measures of the two kinds. Aristotle employed the terms "particular" and "general" to specify the two types of content, and since he did so in a relatively unreflective way, he probably reproduces general opinion. The difference between "general" and "particular" is somewhat vague, though not indefinitely vague. The author of the *Definitions* seized on a temporal criterion in an effort to make the distinction more precise. He may well draw on discussions conducted in philosophical schools. But Aristotle's distinction between the general and the particular, together with its limited vagueness, is the best available clue to common Athenian opinion on the proper content for laws and decrees.

II

In 403/2, after the revolution of the Thirty had been reversed, the Athenians set about revising their laws. The task had been begun as early as 410 (page 45 below) but had not been completed. Andokides (1.83–84) preserves a decree proposed by Teisamenos in 403/2 for continuing and completing the revision. The decree opens in a conservative spirit. The Athenians are to observe the *nomoi* of Solon and the *thesmoi* of Drakon, but "where additional laws are needed," the decree institutes a procedure for drafting and ratifying them. That is, it is assumed that the Athenians will continue to observe their traditional laws with some additions. It is impossible to say how far this assumption departed from reality, since only small parts of the code of Solon and of the code of 403/2 have been preserved.

The decree of Teisamenos speaks of two boards of lawgivers (*nomothetai*) as already existing. Evidently this was one of several decrees bringing about the revision of the laws. The one board of lawgivers is said by Teisamenos to have been chosen by the coun-

cil. They are to propose new laws, where needed, and to display the proposals on whitened boards in front of the statues of the heroes of the ten *phylai.* The number of lawgivers forming this board is not stated. The other board of lawgivers numbered 500. They are said to have been chosen by their fellow-demesmen. They are to take an oath. Together with the council, they are to test and ratify the laws. The two boards may be distinguished as "drafters" and "ratifiers."

It is not known how the council was to collaborate with the "ratifiers." Likewise in the later procedure of *nomothesia,* practiced in the middle of the fourth century, the council was expected to collaborate with each board of lawgivers, but the manner of collaboration can only be conjectured. Another uncertainty concerns the length of time expected for the revision of the laws. The decree of Teisamenos says that the "drafters" are to hand over their proposals to the officers within the present month. But it also authorizes any private citizen to bring his own proposals for laws to the council. The speech of Lysias *Against Nikomachos* (30) says that the accused served as "recorder of laws" for four years. If Nikomachos held a clerical and subordinate position in the revision of the laws, it follows that the work lasted from 403/2 into 400/399 by inclusive reckoning.[4] That is, the revision was completed in 400/399. It may have taken longer than was at first expected. The consequent code could well be called "the code of 403–399," although the name "the code of 403/2" has sometimes been used and is convenient. The designation "code of Nikomachos" has also been employed, but it does too much honor to a humble and perhaps unfortunate person.

The most striking feature of the decree of Teisamenos concerns the 500 lawgivers here called "ratifiers." The striking feature is that they have authority under the decree to ratify laws. The measures which were to constitute the new code were not to be submitted to the assembly of citizens for approval but were to derive validity from the decision of the "ratifiers." In this respect the "lawgiver-ratifiers" of 403–399 resemble the boards of lawgivers known in the middle of the fourth century. They also resemble the later boards in number. Like *dikastēria,* the later boards were multiples of 500 with one member added to prevent a tie. In another respect the "ratifiers" of 403–399 differ from the later boards of lawgivers. The latter, like *dikastēria,* were chosen by lot from among citizens available for service as *dikastai,* but the decree of Teisamenos speaks of the "ratifiers" as chosen by their fellow-

demesmen. So it does not seem possible to associate them with that body of citizens which exercised judicial power.

The decree of Teisamenos provides finally that the laws, when ratified, shall be inscribed on the wall "so that anyone who wishes may inspect them." The wall was a freestanding wall, or rather some freestanding walls, in the *stoa basileios*. Excavation has recovered a small part of it.[5] Eleven fragments have been found and differences of thickness show that there were (at least) three walls. The principal side of the two thicker walls bore a calendar of sacrifices. The fragments provide twenty-six passages of continuous writing. One of these has provisions about the trierarchy. The other twenty-five are provisions about cults. Since the fragments amount to so small a part of the code, they may not be a representative sample. Yet the prominence given to sacred law is remarkable.

After discussing the decree of Teisamenos, Andokides (1.85–89) gives five "supplementary" measures, as they will be called here. They were passed in connection with the revision of the laws. They all contribute to determining what constitutes valid law and so they require attention, although there is no need to keep to the order in which Andokides mentions them. One of the measures orders that judgments in lawsuits and recommendations accepted through arbitration shall be valid, if they were issued while the city had *dēmokratia*. As will be seen later (chapter 5), when *dēmokratia* had substantial meaning, it derived its meaning from contrast with something else. In the context of 403 and the next few years there was no doubt of the contrast. The "supplementary" measure declared invalid the results of lawsuits and of arbitration conducted under the rule of the Thirty. Indeed Demosthenes (24.56), after noting this "supplementary" measure, quotes also a law which explicitly declared invalid all acts and judgments made under the Thirty.

Another of the "supplementary" measures declared that *nomoi* made in or after 403/2 were to be observed. By implication this measure rescinded any rules made before 403/2, unless they were incorporated into the new code. It illustrates the legal sophistication of the Athenians. Effective administration of justice requires that the system of law be closed at some point in the past; otherwise parties can argue indefinitely by citing principles or practices of ever greater antiquity. Even so muddled a system as the English Common Law recognizes a limit of legal memory in the year A.D. 1189.

The most puzzling of the "supplementary" measures provided that

no *nomos* should be made about a specific person, instead of about all Athenians, unless it were passed by a secret vote with a quorum of 6,000 citizens. A law about a specific person can best be called by the Roman name of *privilegium*. The principle restricting *privilegia* was not new to the Athenians, for it had been respected in the procedure of ostracism. A quorum of 6,000 was required for a valid ostracism,[6] and the voting with potsherds was secret. But a difficulty arises because after 403/2 the assembly often voted honors to named persons. Decrees honoring aliens may not have conflicted with the restriction on *privilegia*. For the "supplementary" measure applied to any law about a specific person instead of about all Athenians; so it may have been intended to restrict measures about Athenians but not about aliens. But in and after the fourth century honors were voted from time to time to Athenian statesmen.[7] It is difficult to imagine that as many as 6,000 citizens took part in the voting on all such occasions.[8] When the decree of Ktesiphon granted a crown to Demosthenes, Aischines challenged it in court. His legal arguments (3.9–48) were that Demosthenes had not rendered his accounts at the time of the decree and that it ordered announcement of the award in the wrong place; he did not argue that the measure was an invalid *privilegium*. Again, when the decree of Aristokrates granted special protection to Charidemos, Demosthenes (23.22–99) argued that the decree was illegal because it subverted the homicide laws; Charidemos had received Athenian citizenship (23.145), but in attacking the decree Demosthenes did not ask whether a quorum of 6,000 had been present at the vote. Possibly the problem should be solved by supposing that the "supplementary" measure was intended solely to restrict those *privilegia* which, like ostracism, inflicted a disability, not to restrain the Athenians from honoring men who had done the state some service.

Another of the "supplementary" measures forbade Athenian officers to observe any unwritten law. A few texts suggest that previously it had sometimes been possible to persuade an Athenian audience by alluding to unwritten laws. Perikles in the Funeral Speech boasts that the Athenians respect the laws "and especially those of them which are in force for the benefit of the victims of injustice and those which, being unwritten, bring acknowledged disgrace."[9] The remark is vague, and there is more suggestive force in an assertion made by one of the prosecutors of Andokides, when the latter was on trial for impiety in 400/399 (the occasion when Andokides spoke the speech which quotes the decree of Teisamenos and the "supplementary" measures). The prosecutor says:

> Yet they say that Perikles once gave you this advice about people guilty of impiety, that you should observe not only the written laws about them but also the unwritten laws, on which the interpretive science of the Eumolpidai draws, laws which no one has ever yet had the authority to rescind or the audacity to challenge, and people do not even know who made them. They say that Perikles thought that in this way amends would be made not only to men but even to the gods.[10]

The view attributed to Perikles is sinister. The speaker does not insist on its authenticity. Even if authentic, it was not necessarily uttered in a trial. Possibly it figured in political debate about responding to the allegedly impious acts of the Megarians in about 432.[11] Again, even if the remark as reported by the prosecutor in 400/399 has an authentic core, it may have become distorted in oral transmission through some thirty years. Yet at least the assertion of the prosecutor suggests that before 403 one could sometimes try to convince an Athenian audience by invoking unwritten laws. The "supplementary" measure put an end to that. It tried to give the Athenians the benefits of a positivist system of law, a system, that is, in which one can know in advance what the law requires.[12]

The remaining one of the "supplementary" measures is the most important for the present inquiry. It stated: "No decree of the council or of the people shall have greater authority than a *nomos*."[13] This measure elevated laws above decrees. But its negative formulation shows juristic sophistication. For in the actual administration of justice the question of the relative authority of laws and decrees could only arise if a decree was alleged to contravene a law. The measure is the origin of the view, expressed by orators in the fourth century, that decrees should only be proposed within a framework provided by the laws.[14]

It will be argued below (section IV) that even before 403 the Athenians gave some recognition, though in imperfect form, to the principle that laws had higher authority than decrees. The codification of the law in 403–399, together with the "supplementary" measures, not only stated that principle but also made its enforcement feasible. By 400/399 the Athenians had achieved an up-to-date code of law together with rules for determining what was valid law. Yet one thing may have been lacking. The Athenian concept of law, as apparent from the codification, was static. The

laws were drawn up in definitive form and made available for anyone to read, on the assumption that the code was final. In consequence of the mutability of human affairs, attempts to give institutions final form cannot succeed. The work of codification called for a procedure of amendment. Such a procedure, now conveniently called fourth-century *nomothesia,* was in existence by 382/81 and will be studied in section III. That procedure had not been invented before the decree of Teisamenos was passed, for, as noted above, the modes of choosing "lawgiver-ratifiers" under that decree and lawgivers in the later procedure differed. Was the fourth-century procedure of *nomothesia* devised in the course of the codification of 403–399?

Some utterances in the speeches delivered at the trial of Andokides in 400/399 suggest that it was not. One of the prosecutors said that some years previously Andokides had come from exile to Athens to seek permission for permanent return, "but you drove him away from the city, confirming for the gods the laws which you had voted."[15] This passage is the only occurrence known to the present writer of the phrase νόμον ψηφίζεσθαι. "To make laws" is in Attic νόμον τίθεσθαι, νόμον δοκιμάζειν or νόμον γράφειν.[16] But in the time of Perikles the view was at least known that any measure passed by a majority in the assembly of citizens was a *nomos.*[17] That view was tenable before 403, for although the current laws were believed to be the laws of Solon, the only way of making new measures was by vote of the assembly. The older view ceased to be tenable when the fourth-century procedure of *nomothesia* was introduced; for in consequence it was now possible to make new rules not only by vote of the assembly but also by that procedure. Thus the phrase chosen by the prosecutor of Andokides, "the laws which you had voted," suggests that the fourth-century procedure of *nomothesia* had not yet been instituted.

The same conclusion follows with somewhat greater force from the wording of one of the "supplementary" measures quoted by Andokides. The restriction on *privilegia* said that no such *nomos* should be passed except by secret vote with a quorum of 6,000. Since this measure noted the possibility of a meeting of 6,000 Athenians, the procedure envisaged was probably the voting of a measure by the public assembly, not the *nomothesia* of the fourth century.[18] Yet the measure spoke of a *privilegium* as a *nomos*; in this it conformed to the older view, which could recognize decisions voted by the assembly as *nomoi,* and thus it militates against the

hypothesis that the other procedure, that of fourth-century *nomothesia,* had already been introduced.

III

In the fourth century *nomoi* and *psēphismata* were the two sources of law. The procedure for making *psēphismata* is well known.[19] An item of business had to be discussed in the council of five hundred, which drew up a *probouleuma,* before it was sent to the assembly of citizens for final decision. This provision did not restrict the freedom of the assembly, which could even instruct the council to bring in a *probouleuma* on a specific topic. The *probouleuma* could be a recommendation for action or merely a statement of a problem. The assembly could accept or reject a recommendation of the council. Even if it accepted the recommendation, it could add amendments moved by individual members of the assembly.

The procedure of *nomothesia,* the procedure for making *nomoi* or rather amending the code of 403–399, is attested less plentifully but adequately.[20] It is known from several passages of Demosthenes and Aischines,[21] from some inscribed *nomoi,*[22] and from some inscribed decrees which include a provision that a measure be presented to a board of *nomothetai* for action.[23] On the eleventh day of the first prytany of each year an assembly of citizens was held and the laws were presented to it in four categories, namely:

1. laws concerning the council,
2. common laws,
3. laws bearing on the nine archons,
4. laws concerning the other officers.

It is to be noted that the laws were classiied, as far as possible, according to the officers responsible for upholding them, for the council was considered an office,[24] and the second category was evidently one of "miscellaneous" laws, as they might be called today. One may presume that the laws had been classified into the same four categories in the codification of 403–399. To return to the eleventh day of the first prytany, the assembly voted on each of the four categories of laws in turn, to say whether or not the laws of that category were satisfactory. If it decided that the laws of any category were not satisfactory, three consequences followed. First,

the assembly elected five men to defend the existing laws. Second, any citizen who wished to propose new laws was to publish his proposal on whitened boards in front of the statues of the heroes of the ten *phylai.* He was to do this before the third of the three meetings of the assembly held in the first prytany. Third, the *prytaneis* were required to include the item "lawgivers" (*nomothetai*) on the agenda of that meeting. When that third meeting gathered, it provided for sessions of lawgivers proportional in duration to the number of proposals and it determined whence the lawgivers were to draw payment.[25]

Lawgivers were drawn from among those who had sworn the dikastic oath, and the only board of lawgivers whose size is known numbered 1,001.[26] Since the "lawgiver-ratifiers" of the decree of Teisamenos numbered 500, it should be supposed that each body of lawgivers was a multiple of 500, with one man added to prevent a tie. Consequently, a session of lawgivers was much like a session of a *dikastērion.* There was a difference in procedure. *Dikastai* voted by casting counters, but lawgivers voted by a show of hands.[27] Another procedural matter is an unsolved puzzle. From 379/78 or from an earlier date the officers presiding at meetings of the assembly were nine *proedroi,* drawn from councillors of the ten *phylai* except the one currently supplying *prytaneis.*[28] Lawgivers too met under the presidency of officers called *proedroi.*[29] Were the *proedroi* of the lawgivers the same as the *proedroi* of the assembly? Opinions on this have varied.[30] If *proedroi* in the two functions were the same, that would give meaning to the attested principle that the council should collaborate in the work of lawgiving.[31]

The most significant feature of the procedure of *nomothesia,* described above, is that final authority to choose between the current law and the alternative proposal was exercised, not by the assembly, but by the board of *nomothetai.* This is shown, both by a statement in a law preserved in the manuscripts of Demosthenes (24.33), and by the formula of ratification in the inscribed texts of laws; "resolved by the nomothetai" in those texts[32] is comparable to the phrase, "resolved by the demos," in decrees. It does not follow that the lawgivers exercised supreme and comprehensive authority over the Athenian state. They lacked the power of initiative. They could only come into being and into session at the behest of the assembly, and they could only choose among proposals presented to them; they could not themselves devise proposals. In the fully developed conditions of the fourth century the Athenians refused to entrust supreme and comprehensive authority to any one organ. It

has been argued plausibly (by Hansen, note 24 above) that they had a concept of separation of powers: they distinguished between the power of initiative and the power of decision, and they entrusted these powers to bodies of different kinds.

Several more facts can be learned from the *nomoi* known from their inscribed texts. Two of these are far better preserved than most extant inscriptions. The earlier of them (SEG. 26.72) provides that genuine Attic coins of silver shall be accepted in transactions; two assayers in the status of public slaves are accordingly to be on duty, one in the city and one in the Peiraieus. The inscription bears the name of the archon and shows that the procedure of *nomothesia* was employed as early as 375/74. The other well-preserved inscription (SEG. 12.87) gives a law of 337/36. It was passed in the ninth prytany of the year and thus shows that *nomothesia* was not restricted to the early part of the year. It inflicts the penalties of hereditary *atimia* and confiscation on any member of the Areopagite council who goes up to the Areopagos or takes his seat in the council after the *dēmokratia* has been overthrown. The law would appear to be unenforceable (and therefore bad). One may suspect that it was the product of factional conflict.[33] One can only conjecture how long the procedure of *nomothesia* continued to be employed. The latest attestation (IG. VII, 4254) belongs to 329/28. Evidence is lacking for or against its continuation into the period of severe Macedonian ascendancy. At least the motives which led to its creation early in the fourth century were not diminished, as far as one can see, by the fact that Macedonian rulers made themselves felt in Greek affairs.

Inscribed decrees, which provide that measures be submitted to *nomothetai* for ratification (note 23 above), illustrate a further point. The measures are decisions to spend small sums of money, for example, to honor a man with a crown in a value of ten drachmas. One may wonder why expenditure on such a small scale required authorization by a procedure as cumbersome as *nomothesia*. The explanation was discerned by Kahrstedt long ago.[34] Many expenses, especially for sacrifices, were required by the laws codified in 403–399, and therefore even a small change in the annual budget could amount to a departure from the laws and require authorization by lawgivers. This consideration suggests that a board of lawgivers could be brought into session at any time of the year. Indeed lawgivers are attested for the ninth prytany, as noted in the previous paragraph, and probably (by IG. II^2, 333) for Skirophorion.

Since there were two procedures for passing measures in the

fourth century, namely, by vote of the assembly for a decree and by *nomothesia* for a law, there were two judicial procedures against their abuse. One, the *graphē paranomōn,* was the remedy to be employed against a decree which was alleged to conflict with the laws. It is well known from many political battles, such as the one of 330/29 between Aischines (3) and Demosthenes (18). It existed already in the late fifth century and will therefore require attention in section IV. The other judicial procedure was the *graphē nomon mē epitēdeion theinai* and was available against abuse of *nomothesia.*[35] It is first attested for the year 382/81, when a certain Eudemos was condemned at a trial of this kind and executed.[36] This occurrence shows that the legislative procedure of *nomothesia* existed by 382/81. Only two of the extant speeches (Demosthenes 20 and 24) were delivered in trials on the charge *nomon mē epitēdeion theinai.* Each is a speech for the prosecution and each tries to show that the law proposed by the accused was "inexpedient" (*mē epitēdeion).* Apart from the vague notion of inexpedience, one may wonder what specific defects in a new *nomos* laid it open to indictment. On this there is only one indication, but that is important. If someone proposed a new law through *nomothesia,* and if the new law conflicted with a current law, and if the proposer of the new law did not include an explicit clause repealing the current law, the proposer could be prosecuted under the *graphē nomon mē epitēdeion theinai.*[37] If the prosecution proved its case, the newly ratified law was canceled and the old law remained in force.

In this respect Athenian rules of legislation differed from those of many other systems of law. One may contrast early Roman law. The Romans said that according to the Twelve Tables whatever the Roman people had last ordered was to be valid.[38] The relation between Athenian decrees and the code of 403–399 contrasts with that between the *leges* voted in the Roman *comitia* and the Twelve Tables. It is of some interest that the Romans saw the need to state explicitly the rule that the latest decision of the people should be valid. Possibly the authors of the Twelve Tables were acquainted with a Greek system of law which accepted the Athenian view of the relation between the code and measures voted by the assembled citizens. The rule that the latest act of the sovereign power overrides that power's earlier acts, even if the latter are not explicitly repealed, is part of the modern notion of sovereignty. Since the Athenians did not accept that rule, their concept of law differed from modern concepts of law.

In general the rules which the Athenians upheld in the fourth century amount to a remarkably sophisticated system. In 403–399 they had revised the code to meet current conditions. They ruled that no decree should override a law, and in the *graphē paranomōn* they provided a means to enforce this rule. Sophistication is especially apparent in the recognition, achieved by 382/81, that even within their static concept of law there was need for a regular procedure to amend the code. Three safeguards attached to that procedure are conservative in spirit. First, when the assembly voted that any of the four categories of laws needed to be revised, it also elected five men to defend the current laws. Second, even after a new law had been passed by a board of lawgivers, it could be challenged as "inexpedient" before a *dikastērion*. The third safeguard was the rule that the old law overrode the newly passed law, if the latter did not repeal the old law explicitly. The system as a whole attempted to institutionalize important features of the rule of law, namely, the beliefs that the law should be the same for everyone, whenever a particular case may arise, and that the law should be ascertainable in advance.

IV

The steps taken in 403/2 were not the first attempt to revise the laws of the Athenians. In the fall of 411 the citizens deposed the revolutionary council of four hundred. Thucydides (8.97.2) adds: "Later frequent meetings of the assembly were held, and in these they voted *nomothetai* and other measures concerning the constitution." Several reasons can be guessed why the Athenians recognized at that point the need to revise the laws. The disturbances of 411 had raised questions about the constitution. Financial shortages since the Sicilian disaster of 413 made it temporarily impossible to provide payment for administrative officers. Moreover, since the codification of the laws by Solon long before, a mass of miscellaneous decrees had accumulated. Possibly revision of the laws had been discussed or even begun before the troubles of 411.

In consequence of the activities and misfortunes of Nikomachos a little more is known about the work of revising the laws in the years following 411. Nikomachos served as "recorder of laws," presumably with colleagues, in two periods. His earlier term ended in 404, when the Athenians surrendered to the Peloponnesians, and the prosecu-

tor at the trial of Nikomachos later said that he had kept himself in office for six years.[39] The prosecutor was more likely to exaggerate the term than to minimize it. It follows that Nikomachos took office sometime in 410. Furthermore, the prosecutor said that Nikomachos "made his office last six years instead of four months." Even if allowance is made for misrepresentation, the prosecutor must have found a reference to an expected period of four months in the decision which brought about the appointment of Nikomachos. That is, in 410 it was expected that some stage in the revision of the laws, though not necessarily the whole task, would be completed in four months. In fact, the work had not been finished at the end of the Peloponnesian War, and although the Thirty were commissioned to make laws, the work was continued and completed under the decree of Teisamenos. It is credible that in 410 the Athenians underestimated gravely the length of time which revision of the laws would take. One monument to the work of the ensuing years survives. In 409/8 the "recorders of the laws," as instructed by a decree of the assembly, procured from the king-archon "the law of Drakon on homicide" and together with the secretary of the council they had it reinscribed on stone.[40] The provisions thus inscribed did not need to be ratified anew; they were valid simply because they were "the law of Drakon on homicide."

The work of revising the laws may have made the Athenians think about the nature of law and the source of its authority. Fifth-century utterances on this question point in more than one direction. Xenophon (*Memorabilia* 1.2.42) gives an imaginary dialogue between Perikles and Alkibiades. In reply to a question Perikles says: "All the measures, which the assembled multitude has scrutinized and written to say what should be done and what should not be done, are *nomoi*." The view here expressed is that the vote of a majority in the assembly of citizens is the sole source of law; no distinction is drawn, as was drawn in the fourth century, between *psēphismata* and *nomoi*. But a dialogue composed by Xenophon does not necessarily reflect the principles observed in Athenian public life. It merely shows that the view stated was one of the views, but not necessarily the only one, current among the Athenians. It is likewise well known that sophists discussed questions about political authority. They belonged in a tradition which can be traced back to Hesiod's speculations on justice.[41] Possibly their ideas influenced the Athenians in the late fifth century, but no specific instances of sophistic influence on Athenian law can be traced.

Some remarks made by Andokides (1.95–96) at his trial in

400/399 are more suggestive. Attacking Epichares, one of the prosecutors, he mentions a measure under which, he says, Epichares could be killed with impunity if the measure were still in force, but it is no longer in force, because only laws incorporated into the code of 403/2 or made since are valid (1.99). Interest attaches here to the words which Andokides employs for the measure mentioned. First he calls it a *nomos*. Then he calls it a *nomos* of Solon. But when he finally has it read out to the court, it proves to be a decree of the council and the assembly, dated by the secretary's name to 410/9. At first sight the choice of words by Andokides seems to agree with the view attributed by Xenophon to Perikles; for Andokides, as for Perikles, any measure voted by the assembled citizens was *nomos*. But this interpretation does not do justice to his description of the decree of 410/9 as a *nomos* of Solon. Surely when he called the decree a *nomos* and a *nomos* of Solon, he was trying to give it greater dignity than belonged to a mere decree. Thus his language may suggest, however obscurely, that *nomoi* were superior to *psēphismata*.

A rather similar inference might be drawn, more tentatively, from a choral passage (352–71) in the *Thesmophoriazousai* of Aristophanes, a play produced in 411. After calling down blessings on the city and its people, the chorus lists the women who commit impiety and harm the city. They are those who commit deceit and violate oaths for profit, those who seek to alter *psēphismata* and *nomos* (361), those who betray secrets to the enemies or bring the Medes against the land. A hilarious song sung by a comic chorus is not the right place to seek an answer to the question whether the Athenians of the fifth century attributed the same authority to decrees as to laws. But since the other offenders in the list are described in stock phrases, it is likely that "*psēphismata* and *nomos*" (or some variant, such as "*nomoi* and *psēphismata*," attested for the fourth century in the dikastic oath) was already a current phrase. If so, the fact that not one of the two words but both were uttered together may indicate that some distinction, however imperfect, was already known between *psēphismata* and *nomoi*.

More can be learned from a story told by Herodotos (1.29). Solon, he says, wrote laws for the Athenians at their bidding and made them swear to observe these for ten years. Then he went away on his travels for ten years, so that he would not be persuaded to alter the laws himself. The story may have been embellished in the transmission. Ten years is a long and expensive duration for travels, and if the length of the travels should be doubted, the ten years

of validity for the oath may also be dubious. But at least part of the story is true. Solon certainly wrote laws for the Athenians. It is credible that he did so at their bidding; that is, he was commissioned to write laws by a resolution of the assembly. If so much of the tradition is acceptable, there is no good reason to reject the story that the Athenians swore to observe the laws of Solon. The story of an oath has an important implication.[42] If the laws of Solon derived their authority from an oath sworn by all the Athenians, they did not derive their authority from the vote of a majority in the assembly. Such a vote would have been superfluous and pointless. Indeed it is not self-evident that the whole community is bound by the vote of a majority, unless a law saying so has previously been brought into effect, whether by oath or otherwise. It was in accordance with Greek custom for an oath to be taken when a major reordering of a city was carried out.[43] The function attributed to Solon in Herodotos's story is rather like that of *nomothetai* in the fourth century. In both cases the lawgiver or lawgivers are commissioned to act by a resolution of the assembly; that is, the assembled citizens exercise initiative. In both cases the decision which ratifies measures is taken by the lawgiver(s).

Even if Herodotos's story about Solon's legislation is inaccurate as history of the time of Solon, it is what the Athenians believed in the time of Herodotos. Therefore it reflects the opinion held by the contemporaries of Herodotos on the authority of the laws. To the modern mind that opinion is somewhat unsatisfactory. The question of the nature of law and of the source of its authority is often debated.[44] The Athenians who told Herodotos their story of Solon refused to face the question. They said that they had sworn to obey the laws of Solon, but the oath had only bound them for ten years. They continued to observe the laws of Solon in Herodotos's time, or so they believed, but they did not give any reason for the continued observance. Perhaps one can do justice to their view by saying that they observed the laws of Solon because they were the laws of Solon, or that they observed the laws because they were the laws. A community can function, with efficiency and indeed justice, without inquiring into the source whence its laws derive their authority.

One more feature in Herodotos's story of Solon deserves notice. The laws of Solon are called *nomoi* in that story, as they were regularly in classical Athenian literature. The decree of Teisamenos (page 35 above) speaks of the *nomoi* of Solon and the *thesmoi* of Drakon. But Solon himself called his laws *thesmoi*.[45] Development can be traced in the meaning of *nomos*. It could mean "custom,"

which may have been its original sense. In the administration of fifth-century Athens and probably already in the time of Kleisthenes,[46] it meant "statute," as is clear from the passages discussed above in this section. In Athenian administration of the fourth century *nomos* was the word for any provision of the code of 403–399 or of the amendments to that code.

The *graphē paranomōn* throws further light on the view which Athenians held in the late fifth century about the nature and authority of law. Moreover, it promises to throw decisive light on that topic, since it is not a mere opinion expressed by some Athenians but a feature of public law. It is first attested for 415, when it was employed successfully against a decree which the council had passed.[47] In 411 the revolutionaries persuaded the assembly to suspend the *graphē paranomōn* as a first step toward further changes.[48] In 406 the council passed a *probouleuma* moved by Kallixenos and recommending that the assembly should take only one vote on the question whether to inflict the death penalty on the eight generals who had failed to collect the corpses after the battle of Arginousai. When this recommendation was brought before the assembly, Euryptolemos and other opponents threatened to indict Kallixenos by *graphē paranomōn,* but they were intimidated by the shouts of the crowd and desisted. Euryptolemos still urged unsuccessfully the employment of a different procedure, such as one laid down in the decree of a certain Kannonos, so that each of the accused generals should be tried separately.[49]

From these occurrences it is clear that the *graphē paranomōn* was an established part of Athenian procedural law well before 403/2. How old it was can only be conjectured.[50] So a problem arises. The body of law current in Athens in the late fifth century included not only laws which Solon had written on *axones* long before but also a great multitude of decrees. If a newly passed decree contravened an earlier decree and was accordingly indicted by way of *graphē paranomōn*, how could one tell which of the two decrees had higher authority and was to be dignified with the title of *nomos*? A possible solution to this problem would say that the *nomoi* of the late fifth century comprised both the laws of Solon and some, but not all, among current decrees. But this solution would only be tenable if there had been a criterion recognizable in the late fifth century for determining which decrees were *nomoi.* There is no trace of any such thing.

A more attractive solution may be suggested by contrast with the Roman principle that whatever the people had last ordered was

valid (page 44 above). The modern student may be inclined to take this principle for granted, since he is familiar with the notion of sovereignty. But in the fourth century the Athenians did not accept this principle in relation to laws. They held, on the contrary, that a new law should be declared invalid if it conflicted with an older law which it did not explicitly repeal. If the Athenians held the same view about decrees in the fifth century, perhaps the puzzle arising from the *graphē paranomōn* can be solved. That is, a new decree could be declared invalid by judicial process, if it conflicted with an older decree which it did not explicitly repeal. But this solution does not do justice to the controversy of 406. Euryptolemos threatened to invoke the *graphē paranomōn* against the new decree of Kallixenos and urged the Athenians to adopt a different procedure, such as that laid down by the decree of Kannonos. If the solution here considered were right, those who favored the decree of Kallixenos could have escaped the threat of Euryptolemos by inserting into that decree a clause explicitly repealing or suspending the decree of Kannonos. Instead they had recourse to intimidation.

It is better to recognize in the problem an anomaly of fifth-century law. On the one hand, the Athenians had a concept of law as a set of permanent rules capable of serving as a framework within which resolutions could be passed by a majority in the assembly; so much is implied by the existence of the *graphē paranomōn*. On the other hand, the assembly was in the habit of passing resolutions without regard to any supposed limitations. The work of codification in 410–399 was required, not only because many and multifarious decrees had been passed, but also because the Athenians needed to clarify their concept of law and in particular to distinguish between rules of greater and of lesser authority. By 399 they had accomplished the task and its achievement was summed up in the "supplementary" measure saying that no decree should have greater authority than a *nomos* (page 39 above). But in reaching this achievement the Athenians developed ideas of which the germs had been present in their system of law ever since Solon first codified it.

V

One of the commonplaces of Greek political rhetoric was that one ought not often to change the laws.[51] This principle might be defended on grounds not only of prudence but also of fairness. If the law is to be

the same for everyone, it ought to be the same, not only in the whole territory where it can be upheld, but also as long as the public authority upholding it continues to exist. This consideration of justice explains why the classical Athenians liked to suppose that their laws had been drawn up long ago. After the code was revised in 403–399, they did not refer to it as "the laws from the archonship of Eukleides" or by any designation that alluded to the revision. Instead they continued to call their laws "the laws of Solon."

The development of legislative procedures and safeguards, surveyed in the preceding sections of this chapter, reveals a protracted and careful series of attempts to bring about the rule of law, that is, to ensure that the law should be the same for everyone. The concept of law current among the Athenians was somewhat different from the modern concept. The difference will become clearer if one returns to the question raised at the beginning of this chapter: was the Athenian distinction between laws and decrees the same as the modern distinction between provisions of a constitution and laws, or different? The two similarities specified were procedural; they concerned the means to invalidate measures of lesser authority and to amend provisions of greater authority. Two differences of substance, between the Athenian distinction and the modern distinction, call for note.

First, the Athenians thought that different kinds of material were proper for laws and decrees, even though they may not have pursued the difference to a clear contrast. Aristotle tried to formulate the difference by saying that laws are general, but decrees regulate particular occurrences. Recognition of a difference in proper content accounts for the precept that decrees ought only to be proposed within the framework set by the laws (page 39 above). Do modern states recognize a difference in the content proper for a constitution and for laws?

The Constitution of the United States, as an example of a modern constitution, does not say what kind of material it should comprise. Possibly one could gain clarification by invoking Hart's distinction (note 44 above, 77–96, especially 78–79) between "primary" and "secondary" rules; "primary rules" say what one is required to do, and "secondary rules" say how to make, extinguish, or modify "primary rules" or how to determine their incidence or control their operations. Perhaps, then, "primary rules" should be embodied in the laws and "secondary rules" are proper material for a constitution. Indeed the original Constitution of the United States, as distinct from the Amendments, consists mostly

of "secondary rules." But many of the Amendments state "primary rules." They have equal authority with the original Constitution, and one cannot challenge them on the grounds that their content ought to be embodied in laws instead of in constitutional amendments. Moreover, other nations have adopted constitutions, which are younger than that of the United States. Constitutions have tended to grow longer as time passed. Each constitution, when adopted, has comprised rules which its authors in their time believed important, and the consequences have sometimes been embarrassing a little later. For example, the Fundamental Law of the Federal Republic of Germany includes an Article (12) on free choice of occupation, and this had to be amended in 1956 to provide for obligatory military service.

There can be no doubt that each constitution, when adopted, has contained the material believed important at the time. This criterion of importance as perceived in the historical circumstances has alone determined the inclusion of material in each constitution. There has been no attempt to recognize and follow a permanent principle, comparable to the Athenian distinction between general rules proper for laws and particular applications proper for decrees.

The other difference between the Athenian and the modern distinctions leads further toward recognizing the Athenian concept of law in its distinctive character. The classical Athenians believed that their laws had been issued by Solon long before, and although in the fourth century they instituted a regular procedure of amendment, the procedure was weighted against innovation, since concern for evenhanded justice, as understood by the Athenians, made them reluctant to change the laws. Constitutionally governed states of the present day have a legislature, and one of the primary tasks of the legislature is to make laws (in the Athenian sense of general rules). Statute-law is conceived today primarily as expressing the will of the legislator. This belief springs in part from ideas developed by political theorists, who drew in turn on the Roman notion that government derives its authority from the consent of the governed. The concept of consent and the ideas of the theorists might be subjected to critical scrutiny and perhaps be found wanting. But the modern notion of statute-law as expressing the will of the legislator has a consequence so clear as to stand up to all scrutiny. If statute-law expresses the will of the legislator, it can be changed when the legislator, however constituted, changes his mind. For modern man law is something made and so it can be unmade. For the Athenians law was something already there. A law is a law is a law.

4
The Sanction

The Greek intellect, with all its mobility and elasticity, was quite unable to confine itself within the straight waistcoat of a legal formula; and, if we may judge them by the popular courts of Athens, of whose working we possess accurate knowledge, the Greek tribunals exhibited the strongest tendency to confound law and fact.

H. S. Maine, *Ancient Law* (London, 15th ed., 1894), 75

In the fourth century litigation in most cases followed a standard pattern. Each dispute proceeded through two stages. First, the parties appeared before a magistrate, typically one of the nine archons, for a preliminary hearing (*anakrisis* or *proanakrisis*). This was an opportunity for each party to bring together his evidence and his documents. The second stage was a trial before a *dikastērion,* a body of *dikastai* numbering 201, 401, 501, or occasionally more. At the trial each of the two litigants spoke in turn, and after their main speeches each was allowed a briefer time for a speech of rebuttal. When all the speeches had been delivered, the *dikastai* did not deliberate but cast their votes by means of counters. The same magistrate presided at the trial as at the preliminary hearing, but he did not exercise authority. In particular, at the preliminary hearing he did not issue a judgment or even a recommendation, and although he may have had a modest power to dismiss the parties on the grounds that the plaintiff's plea was not admissible, this possibility is known only from a remark of a late lexicographer.[1]

Any such discretionary power which the magistrate retained became even more restricted in the fourth century than in the fifth. The peace settlement of 403/2, putting an end to the civil war, included a clause of amnesty. When in spite of the amnesty some people sought to prosecute others for deeds committed under the

Thirty, a law was made on the proposal of Archinos to introduce the procedure of *paragraphē*. By this procedure the defendant in his response to the plaintiff's opening plea challenged that plea as inadmissible.[2] The procedure of *paragraphē* came to be used widely; no less than seven of the speeches in the Demosthenic corpus (32–38) were delivered in cases of this kind. It had the effect of transferring any decision needed on the preliminary question of admissibility from the magistrate to the *dikastērion*.

In tracing the way the process of litigation grew in Athens this chapter will keep in mind the question, why procedure had the two stages. Section I will describe the fully developed conditions of the time of the orators. Section II will recognize the two theories current to explain the two-stage procedure and will choose between them. Section III will consider the courts for homicide, since these differed from the *dikastēria* and may well be older. Section IV will look further into origins, and section V will discuss an anomaly which might furnish an objection to the views here endorsed.

As in chapter 3, something needs to be said in advance about terms. Scholars accustomed to the Anglo-American systems have sometimes translated *dikastērion* as "jury" or "jury-court" and *dikastai* as "jurors." Athenian *dikastai* resembled Anglo-American jurors in that they were not learned in the law. But the differences were more serious. Each body of *dikastai* was far more numerous than an Anglo-American jury. *Dikastai* did not deliberate on their verdict but merely voted. Above all, *dikastai* decided the whole issue, since Athenian procedure did not distinguish between question of law and question of fact. If an English word for *dikastai* is needed, it is better to call them "judges" than "jurors." It is better still to call them *dikastai*.

Another question concerns the words *dikē* and *graphē*. These comprised the most extensive classes of lawsuit. A *dikē* could only be initiated by the party who believed that his interests had been harmed or, in cases of homicide, by the relatives of the victim. A *graphē* could be initiated by any adult male citizen who was not disqualified by *atimia* or on other grounds.[3] Probably the reason why a *graphē* was available as the remedy for some conditions was that the interest of the community was at stake; this is true, for example, of the *graphē paranomōn* (pages 44 and 49–50 above) and the *graphē asebeias* (for impiety). So some scholars have called the *graphē* "criminal proceedings" and the *dikē* "civil proceedings." But for some conditions Athenian law provided a *graphē* as the remedy, not because any interest of the community was at stake, but be-

cause the person whose interests were harmed was unable to initiate an action. This is true, for example, of the *graphē* for inflicting harm on an orphan.[4] The orphan, being a minor, could not take action at law. Again Athenian law provided a *dikē* as the remedy for some conditions where modern thought would expect criminal proceedings. Notably the typical procedure for homicide was a *dikē*. Indeed the modern category of "criminal proceedings" is somewhat varied and can better be explained by historical factors than by an underlying principle; so the term should not be applied to Athens. The terms "public action" for *graphē* and "private action" for *dikē* may be rather less objectionable, but there is not much to commend them. The Greek words, transliterated, avoid risk of misunderstanding.

I

Actions following the form of *graphē* or *dikē* were initiated before one of the nine archons. Each of the archons received actions of defined kinds. The distribution of the different kinds of plea is indicated, with omissions, by Aristotle when he reviews the tasks of the nine archons (*AP.*, 56–59), and some principles of distribution can be detected. For example, many suits concerning the family (such as suits for harm to parents, for harm to an orphan, for harm to an *epiklēros*) were brought to the eponymous archon. The king-archon received cases of homicide. The polemarch received cases concerning metics; on the whole his court judged metics in the circumstances under which the court of the eponymous archon judged citizens. The cases brought to the *thesmothetai* were numerous and miscellaneous. It is credible that the *thesmothetai* were created later than the other three of the nine archons[5] and that they were intended to deal with a growing number of types of action as public authority took over more spheres of activity.

Among *dikai* a distinction was drawn between δίκαι πρός τινα and δίκαι κατά τινος. The former class was more numerous. In it only property was at issue. In a *dikē kata tinos* the plaintiff alleged that the defendant had committed an injury against him. If the court found for the plaintiff, the consequence could be a penalty as well as restitution.[6] Torts in modern law are somewhat similar.

Apart from the *dikē* and the *graphē* there were several "special procedures," as they may be called. Some of them deserve to be

noted here, because in spite of their distinctive features they resemble the *dikē* and the *graphē* in that proceedings were in two stages and the second was a hearing before a *dikastērion.*[7] For example, the three "special procedures" of *apagōgē, endeixis,* and *ephēgēsis* were alike in that the Eleven, the officers in charge of the prison, played a part in them. In *apagōgē* one led the alleged offender to the Eleven; in *endeixis* one pointed him out to them, and in *ephēgēsis* one guided them to him. When the Eleven took custody of the accused man, they put him to death, if he admitted the offense, but if he denied it, they brought him before a *dikastērion* for trial. These procedures were available against some classes of thieves, if taken in the act, against kidnappers, against people who stripped a man of his cloak, against adulterers, against some kinds of homicide, and against citizens who contravened a decision depriving them of citizen-rights. The limits to the types of offender against whom these procedures were available may have been vague.[8] The three procedures of *apagōgē, endeixis,* and *ephēgēsis* may be called the "summary procedures," since they could lead to immediate execution, if the accused admitted the offense. They had doubtless arisen by modification of a previous right of retaliation, which did not originally require any intervention by a public officer or a court. The requirement that the offender be taken in the act points to this explanation. Indeed Demosthenes, summarizing some provisions on theft, says that one may kill the nocturnal thief or wound him in pursuit or lead him to the Eleven.[9] In the "summary procedures" the main effect of the intrusion of public authority was to allow the accused a trial before a *dikastērion,* unless he confessed guilt. In formal terms the "summary procedures" resembled the *dikē* and the *graphē* in that there were two stages, the second and decisive stage being a hearing before a *dikastērion.* They differed from the *dikē* and the *graphē* in that the first stage was a proceeding before the Eleven, not before any of the nine archons.

Apart from the "summary procedures," only two of the "special procedures" need be noted here. One of these is *apophasis.* It used to be known mainly from the scandal concerning the money which Harpalos, the treasurer of Alexander, brought with him to Athens in 324. After Harpalos had left, rumor said that some leading Athenians had accepted bribes from him. The assembly passed a decree, instructing the council of the Areopagos to investigate. Six months later the Areopagos presented its report. This gave nothing more than the names of the suspects with a sum of money against each name. Each of the suspects was tried by a *dikastērion.*[10] In

1968 a papyrus fragment (P. Oxy. 2686) of a speech of Hypereides for Chairephilos was published. It belongs to a trial held on another occasion, when the Areopagos had issued a report naming suspects. The fragment refers to charges stated in a decree. Evidently the decree had instructed the Areopagos to investigate. The distinguishing feature of this procedure was a preliminary investigation by the Areopagos, leading to a report (*apophasis*). The report merely identified suspects with a view to trial; it offered an accusation, not a proof, and as far as is known, it did not even cite evidence. The role of the Areopagos in this procedure was rather like that of the archon in the *dikē* or the *graphē*. Proceedings were in two stages, and the second stage provided protection for the accused; he was entitled to trial before a *dikastērion*. The introduction of *apophasis* in the second half of the fourth century illustrates the fertility of the Athenians in procedural law.[11] If a condition was found to need correction, the typical response of the Athenians was not to draw up an elaborate set of substantive rules but to devise a procedure for getting the issue, as often as it might arise, into court, so that the court could regulate each case. But in devising procedures they kept to the pattern of two stages.

The other procedure to be noted is *eisangelia*. Many of the attested applications of this procedure arose from political conflicts and the offense was said to threaten an interest of the community. In most occurrences proceedings were in two stages, the second and decisive stage being a trial before a *dikastērion*. The first stage was a hearing before the council of five hundred or the assembly of citizens. That indeed was the distinguishing feature of *eisangelia*. In a few attested cases there is some evidence for believing that the hearing before the assembly was final and the case was not referred to a *dikastērion*. These cases, though comparatively few, raise a major question of juridical principle and will be considered in section V.

For the present, brief attention needs to be given to two variations from the pattern of two stages, as described so far. First, trials for homicide of the various kinds recognized in Athens proceeded in two stages. The first stage was a preliminary hearing before the king-archon and the second was a trial before a court. The court, however, was not a panel of *dikastai* but for some charges the council of the Areopagos and for others the *ephetai*, a body whose identity is not securely attested. It is reasonable to suppose that some of the features in the procedures for homicide arose early in the history of Athenian justice. They may provide a

clue toward understanding the origin of the other judicial procedures, which grew to overshadow them, and they will be examined in this spirit in section III.

Second, in the fourth century the Athenians had institutions encouraging the settlement of private disputes out of court. When the revolution of 404/3 had been reversed, the thirty itinerant judges of the preceding half century were raised in number to forty, four being drawn by lot from each *phylē,* and they ceased to travel. They can be called "the Forty." Private suits were brought before those four of them who belonged to the *phylē* of the defendant. The Forty had authority to determine cases where the object at stake was worth not more than ten drachmas. If it was worth more, the judges sent the parties to a public arbitrator. Citizens in their sixtieth year were required to serve as arbitrators, and the Forty assigned cases to them by lot. When an arbitrator received a case, he tried to work out a compromise between the parties. If his efforts succeeded, the dispute was at an end. But if either party was dissatisfied with his recommendation, he sent them back to the four of the Forty who were drawn from the defendant's *phylē,* and these judges in turn brought the case before a *dikastērion.* If the object at stake was worth not more than 1,000 drachmas, the *dikastērion* consisted of 201 *dikastai.* If it was worth more, the *dikastērion* consisted of 401 *dikastai.*

Aristotle (*AP.* 53) says that the Forty received "the other *dikai,*" after he has mentioned a series of special cases which had to be settled within a month. It is likely that a great deal of private litigation passed through the hands of the Forty and the arbitrators; so there was a good chance of reaching a settlement out of court. Strong arguments have been offered for supposing that the board of public arbitrators was instituted by a law of 400/399, so that the first board served in 399/98.[12] It should cause no surprise that the board was created at a relatively late date. People call for informal procedure and for settlements out of court when they have learned the delays, costs, and frustrations of litigation. No doubt well-disposed disputants had submitted their cases to arbitrators chosen by mutual agreement from time immemorial. The habit may have been growing toward 400/399, for one of the "supplementary measures" mentioned by Andokides (1.87–88; page 37 above) said that judgments in lawsuits and recommendations accepted through arbitration were to be valid, if they were issued while the city had *dēmokratia.* Indeed the institution of the thirty

itinerant judges in 453/52 was probably intended to provide speedy and informal justice, but nothing more is known about them.[13]

Before leaving the administration of justice in the age of the orators one should take note of the practices adopted for assigning *dikastai* to courts, not least because these may throw light on earlier development. Three methods were employed successively. In the fifth century the list of 6,000 *dikastai* was revised annually, but it was divided into a number of panels (conjecturally ten panels), and each panel was assigned for the whole year to one magistrate and hence to the kinds of case which were brought to him. Thus during the year a *dikastēs* knew in advance what kinds of cases he was to judge and he might even know in advance the names of some accused persons whom he might judge.[14] The second method is parodied in the *Ekklēsiazousai* and the *Ploutos* of Aristophanes. The *dikastai* were divided into ten panels, each panel being designated by one of the first ten letters of the alphabet. Each *dikastēs* retained his letter and his membership in the same panel for a protracted period, presumably for the whole year. On each of the days when courts were to sit panels were assigned by lot to as many courts as were required, the maximum number of courts being ten. Thus in the course of the year each *dikastēs* sat with the same colleagues in the same panel on every day when the courts gathered, but he did not know in advance what kinds of cases he would judge. This method may have been introduced during the reforms which were begun in 403/2.[15] The third method is described by Aristotle as practiced at the time when he wrote. On each day when the courts were to sit two sortitions took place. The first assigned *dikastai* to as many panels as were needed for the day's business. The second assigned the resulting panels to the different magistrates, who were to preside at the hearings, and hence to the different kinds of case. The introduction of this final method probably took place soon after 380, when the requirement was introduced that the pleas of litigants and the testimony of witnesses should be submitted in writing.[16]

The three methods for assigning *dikastai* to courts amount to a transition from rigidity to flexibility. If one reviews them in reverse order, one might conjecture that at a time still earlier than the earliest of the three methods there was only one panel, available throughout the year, so that only one court could sit on any day. Other considerations support this conjecture. Payment for dikastic service was first introduced on the proposal of Perikles.[17]

Previously there cannot have been nearly so many men willing to serve. The growth of prosperity, population, and empire in the central decades of the fifth century doubtless brought an increase in litigation. That may be why the need was discovered for more than one court to sit concurrently. In the sixth century and the early part of the fifth it may have sufficed for a single *dikastērion* to sit on days when trials took place. Further reasons for holding this hypothesis will emerge in section II.

II

In the language of the orators the usual word for "court" was *dikastērion.* But occasionally the word *hēliaia* occurs in contexts where it means the same thing. Thus Demosthenes (23.105 and 114) cites a law about theft and says that it empowers the *dikastērion* to impose an additional penalty of imprisonment, but the law as given in the manuscripts of the speech empowers the *hēliaia* to impose the additional penalty. Again the speaker of Antiphon 6 (21, cf. 23) says that his adversary went to "the *hēliaia* of the *thesmothetai*" and made an allegation against the speaker; the speaker continues that he himself went to the *dikastērion* and said something "to the same *dikastai.*"

The oath sworn by *dikastai* was called "the oath of the *hēliastai*" or "the heliastic oath."[18] Aristophanes in comedies produced in the fifth century uses the word *hēliastēs* and the corresponding verb and adjective.[19] A law preserved in the manuscripts of Demosthenes concludes with provisions in which the wording is noteworthy:

> Let anyone who wishes bring indictments to the magistrates on the counts on which they are the judges (δικασταί). But let the *hēliaia* decide (διαγιγνώσκειν) the cases.[20]

The wording of these provisions reflects archaic usage. The distinction between the task of the magistrate and that of the court may become clear below (pages 68, 79–81). Here it suffices to note that the noun *dikastēs,* best rendered for the classical period as "judge," was originally used of the presiding magistrate, and the word for the court was *hēliaia.* By the time of Demosthenes current usage had changed. The normal word for "court" was *dikastērion* and its

members were called *dikastai.* The older word, *hēliaia,* was preserved in laws.

The comparisons reviewed above show that the classical *dikastērion* was descended from the *hēliaia* and was so closely related to it that it could be called by the same name. But linguistic usage reveals a difference. The word *dikastērion* occurs in the singular and in the plural. The word *hēliaia* occurs only in the singular. This difference suggests that the word *hēliaia* was current at an early stage, when only one court met at any one time. Doubtless all sessions were conceived to be sessions of the same court, whatever its personal composition. It can well be imagined that the growth of judicial business in the fifth century first brought the need for many courts to sit concurrently. The only hint that the word *hēliaia* might develop a plural form is the phrase, "the *hēliaia* of the *thesmothetai,*" which occurs in two texts from the second half of the fifth century.[21] Occurring, as it does, after it had become customary for many courts to sit concurrently, the phrase can be explained as meaning that one of the *dikastēria* which met under the presidency of the *thesmothetai.*

One more text calls for note before controversial questions are broached. Demosthenes (23.97) says that at each meeting of the assembly the herald calls down a curse on anyone who deceives the council or the people or the *hēliaia.* From the texts considered in this section so far three conclusions may be asserted with confidence about the archaic *hēliaia:* (1) it was a court (as indicated by the law on theft, page 60 above); (2) it was closely akin to the classical *dikastēria;* and (3) in importance it was on a level with the council and with the assembly of citizens.

To inquire into the original nature and function of the *hēliaia* is much the same as asking how the classical *dikastēria* developed from the archaic *hēliaia.* On these questions there are two theories, which can be distinguished as "older" and "newer," although the "older" theory is still widely held.[22] The "older" theory rests on three pieces of evidence. First, in many cities, mostly Dorian, the word *aliaia* is well attested in the meaning of "assembly of citizens,"[23] and so is the cognate word *alia* in Dorian cities[24] and, in the form *haliē,* in the text of Herodotos.[25] This meaning accords well with the verb *halizein* = "to gather people together." The second piece of evidence is the statement of Aristotle (*AP.* 3.5), that before the time of Solon the archons had full authority to decide lawsuits, whereas, he adds, in his own time they could only conduct a *proanakrisis* (preliminary inquiry). The third piece of evidence is a

further statement of Aristotle (*AP.* 9.1). Listing the three "most democratic" measures of Solon, he gives as the third "the *ephesis* to the *dikastērion,*" noting that people say that it most contributed to the power of the multitude. He adds in explanation that the people become master of the constitution once they are master of the judicial vote. Holders of the "older" theory believed that the Greek word *ephesis* meant "appeal" or something like it.[26]

The "older" theory held that before the time of Solon lawsuits were judged by the nine archons, according to their different spheres of competence, and the judgment of the archon was final. But, the theory maintained, Solon created a court of appeal, called the *hēliaia,* and the *hēliaia* was a judicial session of the assembly of citizens. Thus a litigant who was dissatisfied with the archon's verdict could appeal to the public assembly sitting as a court; perhaps appeal was only permissible if the value of the object in dispute was above a certain amount. Much later, the theory continued, a change was made in the incidence of popular jurisdiction. The archon's share was reduced from a trial to a merely preliminary and somewhat formal investigation, and so the case necessarily passed to a popular court, which thus exercised jurisdiction at first instance. Some attributed this change to Kleisthenes and others to Ephialtes.[27]

The supports for the "older" theory are two tenets: first, that *ephesis* in Solonian law was appeal, and second, that the archaic *hēliaia* was not a court of first instance but a court of appeal. The first tenet will be scrutinized at some length, for in addition to the problem considered here, the tenet has a bearing on the further question: what role, if any, did appeal play in Athenian justice? The second tenet will then be examined briefly and recognition of further objections to the "older" theory will lead to presentation of the "newer" theory.

In Athenian judicial contexts the noun ἔφεσις and the related verb ἐφιέναι are often employed to say that a dispute was transferred from one authority to another, the second being a court.[28] In the fourth century private disputes were brought first to an arbitrator (page 58 above). If one party was not satisfied with the arbitrator's recommendation, he "transferred the case to the *dikastērion,*" and the phrase employed repeatedly for saying that he did so is ἐφιέναι εἰς τὸ δικαστήριον.[29] This act was not appeal, since the recommendation of the arbitrator was not an authoritative verdict, such as could be appealed. But the act was rather like appeal, since it was performed by a litigant and it transferred the

dispute from a public organ to a court. Again, when a young man was in his eighteenth year, his father presented him to his fellow-demesmen for enrollment. If they were satisfied of his age, they still had to decide by vote whether he was entitled to enrollment. The language in which Aristotle (*AP.* 42.1; cf. page 15 above) states the procedure deserves note:

> If they vote against him, saying that he is not free, he transfers the case to the *dikastērion* (ὁ μὲν ἐφίησιν εἰς τὸ δικαστήριον). The demesmen elect five prosecutors from among themselves. If he is found not to be entitled to enrollment, the city sells him into slavery. But if he wins the case, the demesmen are compelled to enrol him.

Taken strictly, Aristotle's language says that the transfer of the case to the court was not a voluntary act of the applicant but was bound to follow the adverse decision of the demesmen. The fact that an unsuccessful applicant would be sold into slavery tells somewhat in favor of taking Aristotle's language strictly. Much the same can be said about the procedures followed in 346/45, when the list of citizens was revised (page 16 above). Each deme scrutinized its own members, and if a putative member was rejected by his fellow-demesmen, the case was transferred to a court, the word for transfer being *ephesis.*[30]

There is less temptation to translate *ephesis* by "appeal" in the passages where Aristotle describes the scrutiny (*dokimasia*) of the nine archons. All persons chosen to office had to undergo a scrutiny before taking office. The nine archons originally numbered nine, but in consequence of the reforms of Kleisthenes, distributing citizens into ten *phylai,* the number was raised to ten, the additional officer having the title of "secretary of the *thesmothetai,*" although "the nine archons" continued to be the collective name. Aristotle speaks of the scrutiny of these officers in two passages of his account of the Athenian constitution. The first passage (45.3) is neutral for the present purpose:

> The council scrutinizes those who are to serve as councillors in the coming year and the nine archons. Previously it had final authority to reject candidates, but now they have *ephesis* to the *dikastērion.*

This passage shows that the transfer of the scrutiny of the nine archons from the council to the *dikastērion* was properly called

ephesis. The other passage (55.2) is decisive and occurs in Aristotle's account of the nine archons:

> These (sc. the nine archons) are scrutinized first in the council of five hundred, except for the secretary (sc. of the *thesmothetai*), but he is scrutinized only in a *dikastērion* like the other officers (for all officers, whether chosen by lot or by election, are scrutinized before taking office). The nine archons are scrutinized in the council and in a *dikastērion*. Previously a candidate rejected by the council did not take office, but now there is *ephesis* to the *dikastērion* and the *dikastērion* has final authority over the scrutiny.

This passage shows that the transfer (*ephesis*) of the case from the council to the *dikastērion* was not the appeal of a disappointed candidate but was mandatory. The secretary of the *thesmothetai* was a colleague of the other "nine" archons but was scrutinized only in a *dikastērion*. This fact implies that the other nine had to be scrutinized in a *dikastērion*. One may wonder whether the scrutiny before the council retained any more than ceremonial meaning, but that is another question.

A further passage, drawn from a speech of 327/26, would enlarge understanding of the concept of *ephesis* significantly, if the wording of the text were certain.[31] The speaker says that he and his adversary, Phormion, agreed on Theodotos as an arbitrator. When they appeared before Theodotos, Lampis gave evidence in support of Phormion; but this testimony was false and contradicted what Lampis himself had said previously. Theodotos, according to the speaker, knew that the testimony was false, but he did not want to make a recommendation against Phormion, since Phormion was his friend. So, according to most manuscripts, ἐφῆκεν ἡμᾶς εἰς τὸ δικαστήριον—"he transferred us to the *dikastērion*." But one manuscript (S = Parisinus 2934) gives the reading ἀφῆκεν. The readings of S are usually good, but there is a strong objection to its reading here. That reading does not make sense. In a judicial context ἀφιέναι means "to acquit." If accordingly one prefers the other reading, it follows that *ephesis* was not necessarily the act of a litigant but could be initiated by an arbitrator.

Yet another text may have a bearing on the nature of *ephesis*. It is an amendment to the Athenian decree laying down rules for the people of Chalkis in Euboia (note 21 [a] above, lines 71–76). The

amendment provides that cases of a specified kind, if they arise among Chalkidians, are to be judged by Chalkidian courts, unless a penalty of death, exile, or *atimia* is envisaged; but where one of these capital penalties is demanded, there shall be *ephesis* to Athens to the *hēliaia* of the *thesmothetai*. Does *ephesis* here mean a right of appeal for a condemned man to the Athenian court or compulsory transfer of the case to Athens for final settlement (with or without a previous hearing in Chalkis)? Both views have been held. The desire of the Athenians to keep control over Chalkidian affairs after suppressing a revolt provides a clear, though not a decisive, argument for compulsory transfer.[32]

From the foregoing discussion it appears that *ephesis* has a much wider meaning than appeal, and such neutral terms as "transfer" and "reference" are to be preferred. *Ephesis* could be a voluntary act of a party to a dispute when he took the case out of arbitration and into a court. But it could be a mandatory transfer of a case to a court. Even the voluntary act of an arbitrator, who found himself unable to solve a case and referred the parties to a court, was to be called *ephesis,* if the reading of most manuscripts at [Demosthenes] 34.21 is right. *Ephesis* as a transfer due to appeal is attested with certainty only in the decree of the phratry of the Dekeleieis (IG. II^2, 1237; page 13 above). A provision of this resolution of 396/95 allows anyone whom the phratry has rejected from membership to appeal to the Demotionidai, the verb being ἐφεῖναι (lines 30–32). *Ephesis* may also mean transfer by appeal in the regulations for Chalkis.

Since appeal is attested with certainty only in the rules of a phratry, it cannot be proved that the organs of the city, as distinct from smaller associations, ever provided in the administration of justice a procedure of appeal, that is, a procedure whereby a disappointed litigant could challenge voluntarily the authoritative decision of a judge by approaching a higher court. The probabilities deserve a little further consideration, because the question bears on the nature and development of Athenian justice. Appeal is only likely to play a significant part in the development of justice if public authority is relatively strong and, in particular, if it is strong enough to have some prospect of enforcing the judgment delivered in a court of first instance. As long as public authority is too weak to enforce that judgment, a defendant who has lost his case has no reason to appeal. He can ignore the judgment. Indeed a system of law can reach a high level of sophistication without providing for appeal. Appeal played no significant part in the for-

mulary procedure of Roman law.[33] Modern students of Athenian justice have perhaps expected to find a procedure of appeal because they are accustomed to the appellate systems of modern times. Public authority is far stronger in the modern nation-state than in archaic or even classical Athens. Moreover, modern systems of jurisdiction have developed from the authority of kings as the fount of justice. The consequence is formulated well in the Swabian *Lantrehtbuoch* or *Schwabenspiegel:* "The emperor cannot be in all lands and he cannot put right everything that is wrong. Therefore he deputes secular jurisdiction to the princes and the other lords." The assumption that courts should form a hierarchy, linked by a procedure of appeal, originates from the authority exercised by medieval kings, but it is so ingrained in the modern mind that it is present in that far from monarchical document, the Constitution of the United States; that provides (III,1) for "one Supreme Court" and "inferior courts" and (III,2) it entrusts to the Supreme Court in many cases "appellate jurisdiction." One should not suppose that the monarchical idea, with its consequences for jurisdiction, was current in archaic Athens. A different hypothesis about the origin of judicial litigation in Athens will be entertained below (section IV).

The "older" theory about the archaic *hēliaia* drew on Aristotle's statement, that Solon introduced "the *ephesis* to the *dikastērion,*" and understood *ephesis* as appeal. But in view of the preceding discussion it is neither certain nor even likely that Aristotle meant "appeal" by *ephesis*. The other support for the "older" theory was the tenet that the archaic *hēliaia* was not a court of first instance but a court of appeal. The law about theft, preserved in the manuscripts of Demosthenes 24.105 (cf. page 60 above), provides evidence against this. It reads:

> Whenever someone loses something, if he recovers it, condemn to a two-fold fine, but if not, to a ten-fold fine in addition to the payment for responsibility. Let him be confined by the foot to the stocks for five days and five nights, if the *hēliaia* imposes this additional penalty. Let anyone who wishes propose the additional penalty, when the level of penalty is under discussion.

An archaic date for the origin of this law is indicated by the brevity of the phrasing, which omits words for "victim" and "defendant," and by the word here translated as "payment for responsibility" (*epaitia*), the nature of the thing being unknown. The law

assumes that, as in later Athenian procedure, a session of the court to ascertain guilt will be followed, if guilt is determined, by a session to assess the penalty. The latter session is the occasion when the additional penalty of the stocks can be proposed, and the body which has authority to impose this additional penalty is the *hēliaia*. Obviously the question of penalty must be considered, after a finding of guilt, when the case is tried at first instance; one cannot wait for the convicted man to appeal before one assesses the penalty. It follows that in this archaic law the *hēliaia* was a court of first instance.

There are two other objections to the "older" theory. First, that theory supposes that the *hēliaia* was originally a judicial session of the assembly of citizens, that is, the early *hēliaia* was the same in composition as the *ekklēsia*. But one had to be beyond one's thirtieth year of age to qualify for service as a *dikastēs*,[34] and one had to swear the dikastic oath. Membership in the *ekklēsia* was open to male citizens who had come of age in their eighteenth year (cf. page 15 above). Even if one supposes that the numerical determination of the age of majority was a relatively late substitute for proving manhood by bearing arms, it is not possible to identify the potential *dikastai* or *hēliastai*, restricted by an oath and an age of thirty, with the whole body of adult male citizens.

Second, the "older" theory holds that there was a change in the incidence of popular jurisdiction. At first it was exercised on appeal but later at first instance. The change was important, and so holders of the "older" theory have asked when and how it came about. Aristotle attached political importance to the power exercised by the popular courts in his own day, but he does not say when or how the supposed change in the incidence of popular jurisdiction took place. On the contrary, he has two statements on the origin of the power which he discerned in the popular courts, and the two statements are mutually compatible. In tracing the history of the Athenian constitution he says that Solon introduced *ephesis* to the *dikastērion*, he notes that this most contributed to the power of the multitude, and he explains that the people become master of the constitution once they are master of the judicial vote (*AP*. 9.1; cf. page 62 above). In the *Politics* (2.1273b41–1274a2) he says:

> Solon, it seems, did not destroy these institutions which existed before, namely the council and the mode of choosing the officers, but he established the people in power by having the *dikastēria* chosen from them all.

Surely, since Aristotle attached political weight to popular jurisdiction and since he says nothing else about the introduction of popular jurisdiction at first instance, it is best to see in these two statements, the one in the account of the Athenian constitution and the other in the *Politics,* two aspects of the same occurrence, as reconstructed by Aristotle. That is, in his opinion what Solon brought into being was popular jurisdiction at first instance.

Two arguments on which the "older" theory draws still call for note. One is derived from the use of *aliaia* and *alia* to mean the assembly of citizens in some other cities, mostly Dorian. This argument has little weight. No Athenian text identifies the *hēliaia* with the whole body of citizens. At Tegea *aliastai* are attested as a court (note 23 above) and they need not be identical with the citizens in general. The basic sense of *aliaia/hēliaia* may be merely "a gathering of people"; the municipal law of each city could determine which gathering was meant.

The other argument has more force. As commonly understood, Aristotle (*AP.* 3.5; cf. page 61 above) says that before the time of Solon the archons had full authority to decide lawsuits, whereas in his own time they could only conduct a *proanakrisis* (preliminary inquiry). Surely this text indicates that jurisdiction was originally exercised by an authoritative magistrate; what could be more likely than that the first step toward diminishing his authority was the institution of a popular court of appeal? The history of *provocatio ad populum* in the Roman Republic may be called to mind as a model. Those convinced for reasons given above that the "older" theory is mistaken may answer this argument by saying that Aristotle was mistaken in his reconstruction of the conditions obtaining before Solon. It is indeed difficult to see that he could have had much good information. But a more elegant solution to the difficulty is possible.[35] In the time of Aristotle each lawsuit began when the two parties appeared before a magistrate for a preliminary hearing, but often the defendant responded to the plaintiff's plea by having recourse to the procedure of *paragraphē,* introduced in 401/0 (page 54 above). That is, the defendant asserted that the plaintiff's plea was inadmissible. In this way the procedure of *paragraphē* took the decision on the admissibility of the plea out of the authority of the magistrate and entrusted it to a *dikastērion;* if the court found that the plea was admissible, a further trial on the main issue followed. Aristotle's point may be that before the time of Solon, as indeed for a long time afterward, the magistrate had authority to determine the admissibility of the

plaintiff's plea. The later practice of *paragraphē* reduced the magistrate's *anakrisis* to *proanakrisis.*

The outlines of the "newer" theory have perhaps begun to emerge. Its central tenet is that the popular court of Solonian law, the *hēliaia,* exercised jurisdiction at first instance. It was not a special session of the assembly of citizens, it was not a panel drawn from that assembly, it did not derive its authority from that assembly. It was the parent of the classical *dikastēria,* from which it differed mainly in that the *dikastēria* were many, but the archaic *hēliaia* was one. Presumably a minimum age of thirty and an oath were required of archaic *hēliastai,* as of classical *dikastai.* An important feature of the language of the Attic orators supports the belief that the *dikastērion* did not, in principle or in history, derive its authority from the public assembly. In the speeches of the orators the words *dēmos* and *ekklēsia* are equivalent. That is, the people who gather in assembly are equivalent to the body which they constitute by gathering together. But in the speeches the word *dēmos* is hardly ever treated as equivalent to *dikastai* or *dikastērion.*[36]

Some questions remain for holders of the "newer" theory. What, for example, was the size of the *hēliaia* of Solon? Whether the figure of 501, the standard size of a classical *dikastērion,* was feasible depends on an estimate of the number of people able to serve without salary in the time of Solon. No answer can even be conjectured. There is a more important question. If the Solonian *hēliaia* exercised authority independent of the assembly, whence did the *hēliaia* arise? Did Solon devise it solely from his own thinking, with no model to draw on? Or, at the other extreme, did he find it in existence and merely define and perhaps extend the type of cases which it could hear as he wrote the laws down? This question admits no decisive answer, but hints toward an answer will be derived shortly from study of the courts for homicide. Meanwhile it is appropriate to note a feature of Solon's work. The best attested thing about him is that he wrote laws. The Athenians thought that the laws provide for many situations, but other situations arise in the gaps between the laws and must be decided by the courts.[37] This belief is reflected in the opening of the dikastic oath: "I will vote in accordance with the laws and with the decrees of the people of Athens and of the council of five hundred, and on matters where there are no laws, I will vote in accordance with the most just opinion." If Solon held this Athenian belief, it would make sense to suppose that he wrote laws, on the one hand, and provided, on the

other, that matters not covered by the laws should be decided by the *hēliaia*.

III

Five courts met under the presidency of the king-archon to try the private action for homicide. Aristotle (*AP*. 57.3–4) states the competence of each briefly and Demosthenes (23.22–99) discusses their competence at greater length. Probably both authors draw on the code of 403–399. The competence of the five courts may be summarized thus.

1. A court met at the Areopagos to try these charges:
   of voluntary killing or wounding,
   of poisoning, provided that the accused was alleged to have administered the draught himself and provided that death ensued,
   of arson.
   The judges were the members of the council of the Areopagos.

2. A court met at the Palladion to try these charges:
   of involuntary killing and wounding,
   of instigating homicide, if the accused admittedly did not kill with his own hands but employed an agent,
   of killing a slave or a metic or other alien.
   The judges were the *ephetai*.

3. A court met at the Delphinion to try the charge of homicide, if the accused admitted homicide but said that his act was justified by one of the grounds recognized explicitly in the law about this court.
   The judges were the *ephetai*.

4. A court met at Phreatto if a charge of a further act of homicide or wounding was brought against someone who was already in exile for an act of homicide on which the law offered a prospect of reconciliation with the victim's relatives. The accused attended in a boat.
   The judges were the *ephetai*.

5. A court met at the Prytaneion to judge animals and inanimate objects which had caused death.

The judges were the king-archon and the four "kings" (*phylobasileis*) or headmen of the four traditional *phylai* (page 108 below).

Little attention need be given to the fourth and fifth courts, since they did not influence the development of jurisdiction. Speaking of the court which met at Phreatto, Aristotle (*Politics* 4.1300b28–30) says that such cases are few "even in large cities." The court of the Prytaneion met if the killer had not been identified but the instrument with which he caused death had been discovered. The activities of this court were merely formal and it is scarcely to be called a court. The competence of the court meeting at the Delphinion was clearly defined. The allocation of a case to that court depended on a plea entered by the defendant. Its sphere will require brief scrutiny shortly, but attention must first be given to the Areopagos and the Palladion.

Athenian legend said that as a court for trying homicide the Areopagos had been founded when Poseidon prosecuted Ares for killing the former's son.[38] When Aischylos composed the *Eumenides* in 458, he considered himself free to ignore this legend and invent another, which said that the Areopagos was founded as a court for homicide by Athena to try Orestes for killing Klytaimestra. It would be mistaken to infer from these legends that the Areopagos acquired the function of trying homicide at an early date. Mythical time is not an extension of historical time but a different dimension. Myth is not a clumsy attempt to write history but an intellectual enterprise of a different kind. There is another and slightly better reason for supposing that the Areopagos acquired its task of trying homicide at an early date. Its sessions as a court for homicide were restricted to the twenty-seventh, twenty-eighth, and twenty-ninth days of each month,[39] and this restriction might be explained as early. But it can be explained better by the piety of the Athenians, a quality in which they distinguished themselves all through the classical period.

One can best discover the relative antiquity of the Areopagos and the Palladion as courts for homicide by examining the distribution of competence between them. Many historians, guided by the legends which were noted above, have supposed that the Areopagos was at first the sole court for trying homicide, and that the Palladion and the other courts of the *ephetai* came into being when the Areopagos deputed parts of its competence to them. On this view the *ephetai,* whose identity is not securely attested, would

perhaps be a commission drawn from the Areopagos. But this view has difficulty in explaining the distribution of competence between the Areopagos and the Palladion. Some holders of the view have thought that the crucial distinction was between the charges of voluntary and involuntary homicide. But that distinction does not account for the varied competence of the Palladion. The charges of instigating homicide and of killing a slave or an alien cannot be subsumed into a category of involuntary homicide.

A clue toward a better hypothesis is provided by a remark of Plutarch. The Athenians attributed their laws on homicide to a lawgiver called Drakon and they believed that Drakon's activity was earlier than that of Solon. Plutarch (*Solon* 19.3) says that Drakon did not mention the Areopagos in his laws on homicide. So one may suppose that the *ephetai* were the earliest court for trying homicide and originally they tried charges of homicide of all kinds. On this hypothesis a later reform transferred trial of some charges to the Areopagos. The content of the reform can be discovered by examining the classical competence of the Areopagos and the Palladion. The reform empowered the Areopagos to try the charge of killing or wounding an Athenian citizen voluntarily with one's own hands. "Killing or wounding" included poisoning and arson. On this view the apparently miscellaneous competence of the Palladion in the fourth century is fully explained. The competence of the Palladion is the residue left to it after the reform transferred limited competence to the Areopagos. Evidently the reformers considered the offense of killing an Athenian citizen voluntarily with one's own hands peculiarly heinous. Apparently by transferring competence over that offense to the Areopagos they wished to provide special protection for Athenian citizens. Thus the reform presupposes that the distinction between citizens and aliens was known and important, and that provides some indication of its date. In chapter 6 an attempt will be made to discover how the distinction between citizens and aliens grew in significance.

Jurisdiction over homicide was not the earliest kind of judicial competence exercised by the Areopagos. The law of amnesty attributed to Solon is likely to be authentic,[40] since it mentions his archonship as an epochal date and the lack of symmetry in its phrasing is archaic. It exempts from the amnesty people who had been condemned for homicide or massacre or for attempted tyranny. It names as courts the Areopagos, the *ephetai,* and the Prytaneion. The distribution of the named charges between the named courts can be reconstructed for the pre-Solonian period, to which

the law refers. Charges of homicide and of massacre belonged to the *ephetai* or, if the killer had not been identified, to the Prytaneion (page 70 above). Charges of attempted tyranny belonged to the Areopagos. Aristotle (*AP.* 8.4) attributes to Solon a law empowering the Areopagos to try the charge of "conspiring for the overthrow of the demos." This definition of the offense is not archaic, for the term "overthrow of the demos" belongs to the fourth or fifth century. If there is authentic tradition behind Aristotle's attribution of this law to Solon, it should reflect an archaic practice whereby the Areopagos tried the charge of attempted tyranny.

Attention may be given next to the competence of the Delphinion. A law preserved in the manuscripts of Demosthenes (23.53) gives more fully than Aristotle (*AP.* 57.3) the grounds on which the defendant could plead that homicide was justifiable, and the authenticity of the provisions which are crucial to the present argument is guaranteed by the orator's subsequent discussion (23.54–55). The text says:

> If someone kills someone involuntarily in athletic competition, or on overcoming him on the road, or in warfare on mistaking his identity, or on taking him in adultery with his wife or with his mother or with his sister or with his daughter or with the concubine whom he keeps for begetting free children, let the killer not go into exile on these counts.

No satisfactory definition can be offered for the category of killing someone on overcoming him on the road. The other categories can perhaps be explained by invoking a hypothesis stated at the end of chapter 2 (pages 30–31). Originally each householder was master of his house, and the open space between houses was no-man's-land. As time passed, public authority intruded step by step into no-man's-land by seeking to maintain the peace there. Justifiable homicide can be explained as homicide committed in places where public authority does not maintain the peace. Killing of the adulterer is justified because adultery is characteristically an unauthorized intrusion into the house. Killing of a fellow-citizen by mistake in warfare is justified because the state does not maintain the peace on the field of battle. Involuntary killing in athletics occurs in a place where public authority does not presume to restrict violence. Possibly the same explanation could be formulated for the elusive category of killing someone on overcoming him on the road.[41]

The central hypothesis presented in this section so far is that the *ephetai* were the earliest court instituted for homicide. That is, when the state began to intrude into the previously private sphere of retaliation, it created the court of the *ephetai.* So attention must be paid to indications of retaliation for homicide in early Greek thought, which is represented by the *Iliad,* and in early Attic law. The key word is *poinē.* It has a clear etymology, since it corresponds in its components to Lithuanian *kaina* = "price." In the *Iliad poinē* is often wergild, that is, the payment which the killer makes to the victim's relatives in compensation for the loss which they have suffered through the act of homicide.[42] Some extensions of this sense are easy to explain. *Poinē* can be the death inflicted by the victim's relative on the first killer, if the latter does not pay compensation.[43] The injury inflicted in retaliation may be less than death. The harm which Odysseus inflicted on the Kyklops for eating his companions is called *poinē* in the *Odyssey* (23.312–13); here the word approaches its later meaning of "penalty." Another extension of meaning appears when Achilles is said to have set aside twelve Trojan captives as *poinē* for Patroklos (*Iliad* 21.26–28; cf. 23.175–77); they were to be sacrificed on his funeral pyre.

Greater interest attaches to occurrences where *poinē* is associated with acts not of killing but of kidnapping. Zeus gave Tros a present of horses as *poinē* for his son Ganymedes (*Iliad* 5.265–66). When the Greeks and the Trojans decide to entrust the issue of their dispute to a duel between Alexandros and Menelaos, Agamemnon makes three undertakings (*Iliad* 3.281–91). First, if Alexandros kills Menelaos, Alexandros is to keep Helen and the Greeks will sail away. Second, if Menelaos kills Alexandros, the Trojans are to restore Helen and pay compensation to the Greeks. But third, if Menelaos kills Alexandros and the Trojans do not abide by the second provision, Agamemnon will stay and fight "for the sake of *poinē*" (290) until he brings the war to an end.

Judging from these occurrences, the basic sense of Homeric *poinē* is a payment of valuables made to prevent the outbreak of a feud. The acts which could provoke a feud are characteristically homicide and kidnapping. These are the acts in which one group of people deprives another of a member, each member of the group being regarded as an asset with a value. This basic sense accords adequately with Homeric usage of the related word, *apoina. Apoina* are the ransom for restoring a living captive, for restoring a corpse, or for sparing the life of an enemy whom one has at one's mercy on the battlefield.[44] By extension, *apoina* is used of the valu-

ables which Agamemnon offered to Achilles in compensation for the diminution of status which Agamemnon had inflicted in taking away Briseis.[45]

The notions contained in the Homeric words *poinē* and *apoina* are attested, scantily but adequately, in early Athenian law. *Apoina* is cited from the laws of Solon and explained by the lexicographers as "ransom which one gives on account of homicide or a body."[46] The lexicographers do not say whether the body is alive or dead, but "ransom" paid on account of homicide was surely not ransom but wergild. A law preserved in the manuscripts of Demosthenes forbids ill-treating a killer or holding him to ransom,[47] and the word for "holding to ransom" is *apoinān*. So it is of some importance that Photios in his Lexikon attributes the verbs *poinān* and *apoinān* to Solon, explaining them by "to hold to ransom."[48] *Apoinān* in Solon's usage may or may not have been limited in meaning to the idea of ransom, as in the law just noted, but *poinān* must have differed in meaning from *apoinān,* since Solon used both words, and Homeric usage is the nearest clue to the Solonian meaning of *poinān*. Again, "to repay in a value of twenty oxen" is cited from the laws of Drakon.[49] So large a payment can well be imagined to have figured in laws providing compensation for homicide and for severe bodily injury.

Other features of the classical law of homicide can best be explained as relics of self-help and of the early stages in the process whereby public authority intervened to restrict self-help. As late as the time of Demosthenes (23.69) the successful plaintiff was allowed to be present at the execution of a condemned killer, although death was inflicted by public officers. It is easy to explain this provision as a relic of a time when the victim's relatives killed the attacker, with or without judicial process. Again, as late as the time of Demosthenes (23.72), a man found by the court at the Palladion to have committed involuntary homicide was required to leave Attica within a specified time and by a stated route. The specification of the route to be followed would be inexplicable, if the exile incurred in consequence of involuntary homicide had been intended as a penalty. It is better to suppose that in the eyes of public authority a man found to have killed involuntarily incurred no liability, that public authority was too weak to protect him indefinitely from unreconciled relatives of the victim, and that public authority therefore gave him a safe-conduct to the border and thus a chance to survive.[50]

An even clearer relic of self-help is the practice of *aidesis*. The

law of Drakon, as reinscribed in 409/8, opened with provisions about involuntary homicide and said which relatives of the victim were authorized to take part in *aidesis*. A provision several lines lower down on the same inscription said which relatives were to take part in the proclamation issued in the agora against the killer; they were the same as those authorized to take part in *aidesis*. The proclamation opened the proceedings and was the same for voluntary and for involuntary homicide; indeed it was issued before the *ephetai* determined whether the killing was voluntary or involuntary. Since the same relatives were to take action at both stages, it is to be presumed that *aidesis* could take place in consequence not only of involuntary but also of voluntary homicide.[51] Therefore *aidesis* was originally, not a unilateral act of pardon, but the conclusion of an agreement whereby the killer paid compensation to the relatives of the victim and those relatives gave up their right of retaliation.

In a gentler and more secure age relics of earlier conditions were preserved but were understood only in part. *Aidesis* had taken on a new character by the time Demosthenes (21.43) could write: "The laws on homicide punish those who kill intentionally with death and perpetual exile and confiscation of property, but they consider those who kill involuntarily to be worthy of *aidesis* and of much kindness." *Aidesis* had come to be a unilateral act of pardon, extended by the victim's relatives to the involuntary killer. Possibly it had become a habitual and immediate consequence of a judicial finding of involuntary homicide. Likewise, exile as a statutory consequence of a finding of involuntary homicide had come to be regarded as a penalty (as Demosthenes [23.73] regards it), even though it may no longer have come about if *aidesis* was granted habitually. These changes were the consequences of laws which increased the role of public authority in the response to homicide; among those laws the one creating the competence of the Areopagos can be reconstructed in outline (page 72 above).

At the much earlier stage, when public authority first intervened in the previously private sphere of retaliation and negotiation, it created the *ephetai* as a court for homicide. Probably the consideration which prompted this intervention was an insistence on the distinction between voluntary and involuntary homicide. So much is suggested by the prominence given to provisions on involuntary homicide when the law of Drakon was inscribed anew in 409/8,[52] and by the concern for involuntary homicide apparent in scattered passages of Athenian literature.[53] Readers of detective fiction

might expect the earliest court for homicide to be concerned primarily with the question of fact: who killed the victim? But in actual trials nowadays there is often agreement about the identity of the killer and dispute arises only about his motives or state of mind. As long as self-help was practiced in early Athens, the people entitled to retaliate may often have believed that they knew who had killed their relative; the question for the court to decide was whether the killer had acted involuntarily and was therefore entitled to a modicum of protection.

If the *ephetai* were the earliest court for homicide, there is a good chance that they were the earliest court of any kind in Athens. But one has still to ask, who were the *ephetai?* The only good clue to their identity is the fact that for some of their sessions, perhaps for all, they numbered fifty-one.[54] This is an intentionally odd number and resembles 501, the standard size of a classical *dikastērion.* It must be admitted that the resemblance is not a secure basis for inference, but the hypothesis which it invites is that the *ephetai* were a body of Athenians aged at least thirty years and bound by an oath; fifty-one such men were empaneled when a case of homicide was to be tried. If one thinks on these admittedly conjectural lines, one can narrow the limits for answering the questions raised about Solon at the end of section II. The *ephetai* furnished the model on which the *hēliaia* was created. Indeed the two bodies were much alike, but the difference in name may suggest a considerable interval between their dates of origin. It remains an unanswerable question whether Solon created the *hēliaia* or merely enlarged its scope by writing laws.

IV

The Homeric poems are a large monument of early Greek thought. It would be rash to insist that the ideas expressed in them must be wholly the same as those held by the archaic Athenians. But with caution it is reasonable to seek in them some elucidation of Athenian ideas, since performance of the poems was introduced at the Greater Panathenaia in the sixth century and the Athenians understood them without a commentary. The poems throw some light on the word *dikē,* which in fully developed Attic is "a lawsuit," "the judgment of a lawsuit," or "the case presented by a party to a lawsuit." In the *Iliad* and the *Odyssey, dikē* in the context of a

dispute is a settlement of the dispute, whether offered by one of the parties or by a third person serving as arbitrator or judge.[55] Thus at the end of the chariot race held in honor of the deceased Patroklos the competitors quarreled over the prizes, and in a single speech Menelaos as one of the disputants both asked the leaders to "state a settlement" (*dikazein*) and undertook to "state a settlement" (*dikazein*) himself.[56]

Greater interest attaches to the sole passage in the poems where a lawsuit is described. One of the designs on the Shield of Achilles shows a city at peace (*Iliad* 18.497–508):

> The people were gathered in the place of assembly. There a dispute had arisen. Two men were conflicting on account of the wergild for a man who had been slain.
>
> ὁ μὲν εὔχετο πάντ' ἀποδοῦναι
> δήμῳ πιφαύσκων, ὁ δ' ἀναίνετο μηδὲν ἑλέσθαι.
>
> Both desired to get a decision at the hands of a wise man. The people, standing around as partisans, shouted support to each side. The heralds held the people back. The elders sat on polished stones in a sacred circle. They held in their hands the scepters of shrill-voiced heralds. With these they sprang up and they gave judgment in turn. In the middle there lay two talents of gold, to be given to the one among those men who spoke justice in the most straight fashion.

The passage has had much discussion[57] and progress has been made in understanding it. It has become clear that the scene is not the voluntary submission of an issue by the parties to arbitration but a true trial. This is shown by the public character of the place, for the elders sit on polished stones in a sacred circle; it is shown, further, by the participation of heralds and by the scepter(s), which each elder holds as a symbol of authority while he utters his judgment. The fact that both disputants are said to have desired to get a decision at the hands of a wise man indicates that the collaboration of the parties was required for the trial, but that does not degrade the proceeding to the level of arbitration. The collaboration of the parties was required in the formulary procedure at Rome.[58]

Difficulty arises in the passage which has not been translated

above. These lines state the pleas of the two parties. The words stating the first plea have been taken to mean

> either (a) "the one asserted that he had paid in full and demonstrated this to the multitude,"
>
> or (b) "the one offered to pay in full and demonstrated this to the multitude."

Strong arguments in favor of (a) have been drawn from the use of *euchomai* with the aorist infinitive elsewhere in the poems, from the word "in full," which can be more forcefully predicated of what one has done than of what one offers to do in future, and from the fact that the party demonstrated what he said to the multitude; it makes better sense to demonstrate or make plain allegations of fact about the past than mere intentions for the future. Those who have preferred (b) have been swayed by their understanding of the other party's plea. The latter plea has been taken to mean

> either (A) "the other complained that he had not received anything,"
>
> or (B) "the other refused to accept anything."

Strong arguments in favor of (B) have been drawn from the fact that *anainomai* elsewhere in the poems means "to refuse," not "to deny (a matter of fact)" (*Iliad* 18.450; 23.204; Hesiod fr. 73 line 4 Merkelbach and West), and from the poet's choice of *mē* as the negative; in Homeric Greek, as in classical Greek, *mē* negates a wish or intention, not a matter of fact.[59]

In view of the arguments offered above, the best rendering of the passage is:

> "The one asserted that he had paid in full and demonstrated this to the multitude, but the other refused to accept anything."

That is, after the act of homicide took place, some of the relatives of the victim were willing to negotiate an agreement with the killer, and he paid them in full the agreed sum in compensation. But one of the relatives was recalcitrant. He refused to accept compensation and thereby give up his right of retaliation. When the case came before the elders in the scene portrayed on the Shield, the plea of the one party was not a straightforward denial of the plea made by the other party. They were arguing at cross-purposes, or to adopt a phrase preferred by jurists, the issue had not been joined.

When disputes arise, it often happens that at first the parties argue at cross-purposes. Joining the issue is then an important preliminary to bringing the case into court for trial. In the formu-

lary procedure at Rome the first stage, the proceedings *in iure* before the praetor, were the occasion for joining the issue.[60] In classical Athens the first stage of proceedings was the *anakrisis* before the magistrate, and he determined whether the plea of the plaintiff was admissible. This was the occasion for joining the issue, until in the fourth century the growing popularity of the *paragraphē* transferred to a *dikastērion* the decision on admissibility (pages 54 and 68 above). A decision that the plaintiff's plea was admissible had the effect of joining the issue on that plea.

In the scene on the Shield of Achilles the issue has not been joined, but the parties have come before the elders in expectation of a definitive solution to their dispute. In this respect the proceedings, although a true trial, belong to a stage when administration of justice was still rudimentary. The elders have not been given a question to answer on the basis of the laws. Instead, they have been presented with a tangled dispute, and the parties have some hope that one of the elders may be clever enough to devise a solution which both parties will be willing to accept. The people stand around and shout support for each side. As each elder formulates his proposal, he can take into account the shouts which greeted the proposals of those among his colleagues who have already spoken. Thus he can estimate the degree of political power which each of the parties commands in the community. If one of the elders offers a solution which both parties can accept, he will receive the prize of two talents of gold. If none of them offers such a solution, each of the parties can call out those among the people standing by who have shouted for him and thus he can assert his right by force. That activity could lead to the custom of settling differences by the vote of a majority in a primary assembly, a possible development which will be noted in chapter 6. Another possible development from the scene on the Shield of Achilles would lead to trial by a relatively small council, a body arising from the elders who sit on polished stones. At Sparta the council, called the council of elders, judged capital cases in the fourth century.[61] At Athens at an early stage the council of the Areopagos judged charges of attempted tyranny.[62]

Starting from the practices illustrated on the Shield of Achilles, historical development might lead in more than one direction. There were several possibilities because the administration of justice was still rudimentary. Some forty years ago Wolff (note 57 above) rightly took account of the Shield of Achilles in presenting a theory about the origin of judicial litigation among the Greeks.

Rejecting theories which sought the origin in arbitration, he started from a condition where self-help was customary. A party threatened by another party's imminent act of self-help may seek protection from a public officer. Then, Wolff suggested, the officer may do two things. He extends temporary protection to the defendant, that is to say, to the party who has sought his protection, and he calls together a court to judge the dispute. If the court finds for the plaintiff, the officer withdraws his temporary protection from the defendant, and the plaintiff resumes his act of self-help. On Wolff's theory "judicial litigation came about . . . through the substitution of controlled self-help for uncontrolled self-help" (p. 82).

Good reasons for holding this theory were presented by Wolff and have been developed somewhat further by Ruschenbusch (note 4 above). It accounts for the vestiges of self-help recognizable in fourth-century proceedings. It explains why a lawsuit in Athens proceeded in two stages with two authorities playing different parts. The first stage, the (*pro*)*anakrisis* before the magistrate, arose from the defendant's original approach to the magistrate and the latter's decision to grant him temporary protection. At the second stage a different body, the court composed of *dikastai,* judged the dispute. The formulary procedure likewise had two stages, *in iure* and *apud iudicem,* and the same explanation may be valid. The same may be true of other occurrences of procedure in two stages in ancient republics.[63]

It should be admitted, however, that the scene on the Shield of Achilles lends support to Wolff's theory only at one point. If the order in which the poet states the two pleas is the order in which they are imagined to be spoken, then the defendant, the man accused of homicide, speaks first. This order conflicts with modern expectations, but it makes good sense, if the defendant has to show that the plaintiff's act of self-help ought to be suspended temporarily, while the dispute is judged, and abandoned thereafter in return for compensation. But because the proceedings on the Shield are rudimentary in character, they cannot be expected to furnish much illustration of any clear line of development.

Wolff's theory implies that judicial litigation in the form in which it developed in classical Athens sprang, not from the power of authoritarian kings, but from the efforts of the community and its officers to maintain the peace by restricting the exercise of an acknowledged right of self-help. The type of society which his theory supposes as the starting point is pluralistic. Within it many people have rights and these may come into conflict; organs for the

administration of justice are created to ward off the risk of violence. One passage of the *Odyssey* (12.439–40) suggests a more authoritarian pattern. The poet mentions there the time of day at which a man rises to leave the agora for dinner "when he judges many disputes among the *aizēioi* who seek justice from him." *Aizēioi* here should be understood as men of dependent status, who are subject to a master. Hesiod (*Works* 441) uses *aizēios* of the hired laborer who follows the plough, and Horace (*Carmina* 3.5.53–56), perhaps imitating the passage in the *Odyssey,* used *clientes* of the men whose disputes Regulus might settle before departing for rural leisure.

The poems of Hesiod reveal little about the administration of justice, but so far as they disclose a pattern, it is authoritarian. Judgments are given by kings or lords (*basilēes*), who consume "gifts" (*dōra*). The "gifts" are probably fees, not bribes.[64] The duty of the kings to issue straight judgments is spoken of in language resembling that used of the judgments of Zeus.[65] Their power cannot be resisted, and they are exhorted to judge justly.[66] There is no indication of any division of function between magistrate and court, as in classical Athens. The administration of justice, as portrayed in the Hesiodic poems, is not precarious, as it appeared on the Shield of Achilles. It should cause no surprise to discover that archaic justice sprang from different origins in different parts of Greece. The methods which developed in Athens and become apparent in the classical period presuppose a community whose members learned to collaborate to a considerable degree, through public officers and courts, in order to maintain the peace. A community of this kind is rather more similar to the pluralistic, insecure, and rudimentary conditions shown on the Shield of Achilles than to the monarchical justice portrayed by Hesiod.

V

The preceding sections of this chapter have been concerned with lawsuits which came about because of disagreement between two private parties. But some lawsuits arose from a different cause, namely, because a private person was alleged to have harmed the interest of the community. Suits of this kind include those arising under the *graphē* in some of its occurrences (cf. page 54 above) and those arising under the procedure called *eisangelia.* They may be

somewhat later in origin than the earliest form of litigation between private persons (the *dikē* judged by the *ephetai*), for they presuppose a community sufficiently self-conscious to recognize its collective interest and institute a procedure for defending that interest. The procedure was very similar to that between private persons. Anyone who wished (*ho boulomenos*), unless disqualified by civil disability, could initiate action by making a complaint against a named person. The man who had thus initiated action had to continue the proceedings by appearing as prosecutor or plaintiff against the defendant. In the *graphē,* which came before a panel of *dikastai,* the similarity of this procedure to the *dikē* between private persons is obvious and needs no further comment. More must be said about *eisangelia.*

Recent studies have clarified much in the history of *eisangelia,* and only some of its features call for note here.[67] In most of its occurrences *eisangelia* resembled the *dikē* and the *graphē* in that it proceeded in two stages, the final stage being a trial before a *dikastērion.* As in the *graphē,* any Athenian not disqualified by diminution of civil rights could initiate the procedure of *eisangelia.* This procedure was employed most often against generals and politicians on major political offenses (such as betraying ships or land forces to the enemy, or giving deceptive advice to the assembly in return for bribes). In the classical period the distinctive feature of *eisangelia* was that the first stage was not a preliminary inquiry before a magistrate but a hearing before the assembly of citizens or before the council of five hundred. Two questions need not be pursued here: whether *eisangelia* was only available for offenses stated in the *nomos eisangeltikos,*[68] and what role was played in the archaic period by the council of the Areopagos in the development of *eisangelia.*[69]

A distinction of form can be recognized between *eisangelia* of two kinds:[70] sometimes the first hearing was before the council and sometimes before the assembly. If the prosecutor brought his indictment to the council of five hundred, the first hearing took place before that council, and if the council found that the case against the defendant was strong enough and important enough to deserve trial before a *dikastērion,* the resolution voted by the council was called a *katagnōsis* and the transfer of the case to the *dikastērion* was *ephesis.* But the council had authority to impose a fine not exceeding 500 drachmas without referring the case to a court.[71] If on the other hand the prosecutor brought his indictment to the assembly, that body had to decide, probably in a brief manner,

whether to pursue the matter. If it decided to do so, it instructed the council to inquire into the allegation. The council's subsequent report was a *probouleuma,* or recommendation addressed to the assembly. At a further session the assembly received the *probouleuma* and deliberated on it; this was the first stage of proceedings, comparable to the preliminary inquiry before a magistrate in a *graphē.* If the assembly at this stage found that there was a *prima facie* case against the defendant, it usually referred the case to a *dikastērion* for trial.

Starting from this procedure of *eisangelia,* as practiced in the fifth and fourth centuries, one may look back to reconstruct its origin. Surely one may suppose that the development of *eisangelia* toward articulate form began one day in the archaic period, when someone told the assembled Athenians that something was not as it ought to be and the assembled Athenians had become sufficiently conscious of their common interest to take remedial action, in however simple a form. A not dissimilar occurrence took place in the developed conditions of 415. The assembly had gathered to consider matters raised by the three generals, who had been commissioned to conduct an expedition to Sicily, but Pythonikos stood up at the meeting and said:

> Gentlemen of Athens, you are despatching an expedition and such great preparation and you are preparing to undergo danger. But I will demonstrate to you that Alkibiades the general performs the mysteries with others in a house, and if you vote immunity to the man for whom I request it, a slave of one of those men there will tell you the mysteries, although he has not been initiated; otherwise do with me as you wish, if I do not tell the truth.[72]

An inquiry and trials followed. It may sometimes have happened that a private person offered the assembly information about an alleged impropriety, but was told in the subsequent discussion in the assembly that a *graphē* was available to provide a remedy and so he should address himself to the appropriate magistrate. As time passed, the field of business covered by *graphai* grew, but *eisangelia* remained available and was often employed against generals and politicians.

The assembly could deal in an arbitrary fashion with people not protected by law. The decree passed by the Athenians in 446/45 to

regulate their relations with Chalkis required the council and the *dikastai* to swear an oath, and one of its provisions was:

> I will not drive the Chalkidians out of Chalkis, and I will not destroy their city, and without trial I will not deprive any private person of his civil rights or penalize him with exile or seize him or kill him or deprive him of his property without the demos of the Athenians.[73]

This provision implies that the Athenian assembly could by vote impose the named penalties on a Chalkidian without allowing him trial. Such a decision of the assembly, had it taken place, could better have been classified as an administrative act than as a trial. In the modern phrase, the accused Chalkidian would not have had due process, that is, a hearing according to the applicable laws and customs. What safeguards were there for due process, if an Athenian was indicted by *eisangelia*?

Athenian tradition, reported by Aristotle (*AP.* 9.1), said that Solonian law provided *ephesis* to the *dikastērion* (cf. pages 61–66 above). So the question becomes, was *ephesis* to the *dikastērion* observed in cases prosecuted by the procedure of *eisangelia*? For *eisangelia* to the council the answer is clear. The council had authority to impose a penalty not exceeding a fine of 500 drachmas, but if the alleged offense called for a more severe penalty, the case was transferred to a *dikastērion*. For *eisangelia* to the assembly the record is a little less clear. After compiling a catalogue of all known examples, Hansen (*Eisangelia,* 51) found that, among cases of *eisangelia* to the assembly where the final forum is known, eighty-six were referred to a *dikastērion* for trial, but eleven cases were determined by the assembly. These eleven cases may be listed as follows. Some of them do not necessarily infringe the principle of *ephesis* to the *dikastērion*.

1. *The second trial of Miltiades, 489.* Herodotos (6.136; cf. Plat. *Gorg.* 516d–e) says that Xanthippos brought Miltiades before "the demos" and that "the demos" refused to condemn him to death but sentenced him to a fine of fifty talents. Herodotos has said previously (6.104.2) that the first trial of Miltiades (493) took place before a *dikastērion*. So his specification of the assembly as the forum for the second trial should be respected.

2. *The trial of Hipparchos son of Charmos.* This trial is known only from a brief remark of Lykourgos (1.117), who says that Hip-

parchos did not await judgment "in the demos" on the charge of treason but left the case undefended and was condemned in default to death. Hipparchos was ostracized in 488/87. He may well have been removed by ostracism before the trial took place, or possibly the "trial" mentioned by Lykourgos is a confused recollection of the ostracism.[74] The brief statement of the orator, made a century and a half after the event, is a poor basis for inference. But if Hipparchos was tried, it is likely that judgment was given by default, and if so, there was no breach of the principle of *ephesis* to the *dikastērion*. A defendant's right of access to the court is not infringed if he does not come to court to defend himself.

3. *The trial of eight generals, of whom only six were present, after the battle of Arginousai, 406/5.* Xenophon (*Hellenika* 1.7) gives a full account. The *probouleuma* of Kallixenos, under which the eight men were tried, recommended that the assembly should take a single vote to determine finally the guilt or innocence of them all. Euryptolemos proposed to indict this *probouleuma* as contrary to the laws, but he was deterred from doing so by threats in the assembly (1.7.12). The occurrence of intimidation suggests that the *probouleuma* was indeed contrary to the laws. But the complaint voiced by Euryptolemos, as far as known, was that a single vote was to be taken on all eight men (1.7.26 and 34), not that there was no provision for *ephesis* to the *dikastērion*. So the objection of Euryptolemos may have admitted that the assembly had authority to determine the cases finally, provided that it tried each man separately. Another argument uttered by Euryptolemos points to the same conclusion and will be considered below.

4. *The trial of Ergokles, 389.*[75] As general he had served with Thrasyboulos on the Asiatic coast but was recalled and prosecuted. Philokrates, the associate and treasurer of Ergokles, was also prosecuted. The trials are known from two speeches of Lysias, *Against Ergokles* (28) and *Against Philokrates* (29). The former was addressed to the assembly (28.1). It shows that the assembly debated the alleged guilt of Ergokles, but that does not exclude the possibility that the case was transferred to a *dikastērion* after the assembly had voted that there was a *prima facie* case against Ergokles. The speech *Against Philokrates* was delivered before *dikastai* (29.1, 2, 7, 11 fin.). One sentence (29.2) of this speech reports the outcome of the trial of Ergokles; addressing *dikastai*, the speaker tells them that they condemned Ergokles to death. The verb used of the decision is *cheirotonein;* used strictly, this verb indicates a

vote by a show of hands, as in the assembly, not a vote taken by casting counters, as in a *dikastērion*. On the other hand, the speaker tells his hearers, who are *dikastai,* that they condemned Ergokles; by identifying his hearers with the people who condemned Ergokles he may imply that Ergokles was condemned by a *dikastērion*. Yet the identification may be loose; the speaker may mean that Athenian citizens, such as the *dikastai* whom he addresses, condemned Ergokles. It is further possible that the speaker's brief statement conflates two stages in the trial of Ergokles; the assembly voted against him by a show of hands and then *dikastai* heard and condemned him. The proper conclusion is that one cannot tell whether Ergokles was finally condemned by the assembly or by a *dikastērion*.

5 and 6. *The trials of Thrasyboulos of Kollytos, 387/86 and after (?).* In 353/52 the speaker of Demosthenes 24 (134) said: "You all remember that Thrasyboulos of Kollytos was twice arrested and was judged in the assembly at both trials." In 382 the speaker of Lysias 26 (21–23) said that Thrasyboulos had betrayed Athenian ships and made the Athenians deliberate about survival. The reference was to the defeat of the Athenians in 387/86; Antalkidas outmaneuvered the Athenian forces in the Hellespont and also captured the eight ships which Thrasyboulos brought as reinforcements from Thrace.[76] One or both of the trials of Thrasyboulos was a consequence of this disaster. But in 382 Thrasyboulos was free to plead at the *dokimasia* of an archon (Lysias 26.21). So the outcome of the trials was probably acquittal, since the most likely penalty for betraying ships was death. Accordingly, if it is accurate to say that Thrasyboulos was judged in the assembly, there was still no breach of the principle of *ephesis* to the *dikastērion*. The assembly found that there were no adequate grounds for trying Thrasyboulos. Thus it acquitted him without passing the case on to a *dikastērion*.

7. *The trial of Timotheos, 373.* On this case the record ([Demosthenes] 49.9–10) is clear. Attacked by Kallistratos and Iphikrates, Timotheos stood trial in the assembly. His relatives and friends, including Alketas of the Molossoi and Jason of Pherai, interceded for him. The occurrence was sensational. The assembly acquitted Timotheos.[77] In this case certainly, as probably in the trials of Thrasyboulos, no question arose of allowing or denying *ephesis* to the *dikastērion*.

8. *The trial of Antimachos, 373.* The same text ([Demosthenes] 49.10) says that the Athenians judged Antimachos, the treasurer of

Timotheos, in the assembly, and that they executed him and confiscated his property. If this is a full account of the trial, it would appear that the principle of *ephesis* to the *dikastērion* was not observed. On the other hand, the orator says far less about the trial of Antimachos than about that of Timotheos. It is a tenable, though unsupported, hypothesis that the assembly found good grounds for trying Antimachos and sent the case on to a *dikastērion* for final disposition, and the speaker of [Demosthenes] 49, pleading eleven years later, mentioned only the hearing in the assembly because that was the more memorable stage of the proceedings.

9. *The trial of Timagoras, 367.* On his return from the Persian court, Timagoras was denounced by his fellow-envoy, Leon. Speaking in 343/42, Demosthenes says that the demos sentenced him to death by a vote; the verb chosen for voting is *cheirotonein.*[78] Thus the scanty evidence suggests final decision of the case by the assembly. But since the remark of Demosthenes is brief and was made more than twenty years later, it is not impossible that the hearing in the assembly was followed by a hearing in a *dikastērion,* but the guilt of Timagoras became so manifest or notorious at the hearing in the assembly that the hearing in the *dikastērion* was not memorable.

10 and 11. *The trials of Kallisthenes and Ergophilos in 362.* Both men had been generals in 363–62. Kallisthenes operated against Amphipolis; Ergophilos operated in the Hellespont. Aristotle (*Rhetoric* 2.1380b10–13) says that the demos condemned Kallisthenes to death on the day before it acquitted Ergophilos. Aischines (2.30) says that Kallisthenes was executed by the demos. The treatment of Ergophilos does not conflict with the principle of *ephesis* to the *dikastērion.* The assembly found that there was no case against him. The treatment of Kallisthenes appears to conflict with that principle, as far as the scanty evidence indicates. It is conceivable that the case of Kallisthenes was sent to a *dikastērion* after the vote of the assembly, but Aristotle and Aischines omitted to mention the final stage, since it was relatively unimportant. But this hypothesis is weak, since Aristotle and Aischines are independent witnesses to the tradition.

The eleven cases, in which the hearing of *eisangelia* before the assembly has been considered final, have now been surveyed. There was probably no conflict with the principle of *ephesis* to the *dikastērion* in the trial of Hipparchos, if he was not in Athens to

defend himself and judgment was given against him by default. There was no conflict with that principle in the trials of Timotheos and of Ergophilos or probably in those of Thrasyboulos, since the hearing before the assembly issued in a vote of acquittal and there was no case to defend before a *dikastērion*. Among the eleven cases the one of which a full account is extant is the trial of the generals after Arginousai. As Xenophon's narrative shows, the Athenians regretted the occurrence afterward and they did not consider it due process, but it is not clear that the omission of *ephesis* was their reason for regret. The principle of *ephesis* to the *dikastērion* was breached in the second trial of Miltiades and perhaps in that of Ergokles. The inference that it was breached in the trials of Antimachos, Timagoras, and Kallisthenes can be avoided by a tenable, but gratuitous, hypothesis.

Further light on the power of final disposition apparently exercised by the assembly is thrown by an argument which Euryptolemos offered when he opposed the *probouleuma* of Kallixenos on the trial of the generals. He suggested two procedures as preferable. One was furnished by the decree of Kannonos. This decree said that, if anyone injured the people of Athens, he should be arrested and he should answer the charge "in the demos"; if convicted, he should be executed by being thrown into the pit. The other procedure was furnished by the law on *hierosyloi* and traitors. This provided that the accused should be tried in a *dikastērion*; if convicted, he should not be buried in Attica.[79] Comparison of the two procedures, as stated by Euryptolemos, shows that the decree of Kannonos provided for trial in the assembly without any ensuing trial in a *dikastērion*. Euryptolemos, who insisted on due process, found that procedure acceptable, provided that each accused person was tried separately.

It must be concluded that in the fifth century and the first half of the fourth the assembly could pass final judgment in cases of *eisangelia*. Such occurrences seem to have been infrequent, although possibly some have escaped record. It is important to note that the trial of Kallisthenes was the last known occurrence of this kind. Thereafter every case of *eisangelia* to the assembly was referred by the assembly to a *dikastērion* for final disposition. It has therefore been suggested that some years after 362 legislation was passed to safeguard the principle of *ephesis* to the *dikastērion*.[80] Part, though probably not all, of the legislation may be recognized in a law given in the manuscripts of Demosthenes 24.63. The law purports to have been proposed by Timokrates and ratified by *nomothetai* an

appreciable time before the date of speech 24 (353/52). The law concerns people accused by *eisangelia* to the council. If the council finds that there is a *prima facie* case against the accused, who is accordingly held in prison, but if the council fails to hand over the *katagnōsis* to the *thesmothetai* as required by the law of *eisangelia,* then the law of Timokrates orders the Eleven, who have charge of the prison, to bring the accused before a *dikastērion* within thirty days. This law institutes a procedure to ensure prompt trial of persons indicted in *eisangelia* to the council, and it brings in the Eleven as the agency to bring the case into court. One may easily suppose that in a similar spirit and about the same time a law was passed about persons indicted by *eisangelia* to the assembly. Like the law of Timokrates, the other law may have employed the Eleven as its agency and may have instituted a procedure to ensure prompt trial before a *dikastērion.*

This chapter has tried to reconstruct in outline the history of the administration of justice in Athens. It has treated some matters in summary fashion but has gone more thoroughly into others, where a principle of jurisdiction was to be discovered. The division of each proceeding into two stages, a preliminary hearing before an organ of varying character and a definitive trial before a court, has served as a clue for tracing origins, development, and jurisdictional goals. It has become clear that Aristotle was right in attaching importance to "*ephesis* to the *dikastērion.*" That principle can be expressed in modern terms as a right of access to the court. It probably emerged first in the treatment of homicide and was extended, in or before the work of Solon, as other kinds of pleas were introduced. In Athenian society the principle of access to the court was a crucial means to achieve the rule of law. In all systems the rule of law is somewhat vulnerable, especially in cases which have political overtones. In Athens cases of political character were often tried under the procedure of *eisangelia* to the assembly. So it need cause no surprise that in some such cases the accused did not get access to the court. This abuse ceased toward the middle of the fourth century. On the whole, the Athenian record for procedural miscarriages of justice is enviably short.

5
Demokratia

Denn eben, wo Begriffe fehlen,
Da stellt ein Wort zur rechten Zeit sich ein.
—Mephistopheles, in Goethe, *Faust* I, 1995–96

It has become apparent in the previous two chapters that the Athenians were concerned to achieve the rule of law (a modern phrase, which will require attention in chapter 7). To this end they codified their laws (chapter 3) and they instituted courts which were independent of other public organs (chapter 4). Yet many historians nowadays have been attracted to the study of the Athenian constitution, not because it displays the rule of law, but for a different reason. They have been fascinated by the development and working of democracy in Athens. It would surely not be unfair to say that the theme of democracy is the reason why they consider Athenian constitutional history worthy of study.[1]

This fascination with Athens as the paradigm of democracy can be explained in part, but only in part, by the literary sources extant. *Dēmokratia* and words related to it by similarity or contrast occur with some frequency in the writings of Thucydides and Pseudo-Xenophon and in the political works of Aristotle. They are far less frequent in the preserved speeches of the Athenian orators. Those speeches are the best source of information for the way Athenian institutions worked. The people who made the institutions work in the assembly and the courts were not so obsessively concerned with *dēmokratia* as Aristotle, or from a different point of view Thucydides, or many modern historians. It would perhaps not be fanciful to say that the twentieth-century focus on democracy in Athens reflects a twentieth-century outlook. To recognize an outlook which has been taken for granted is the first step toward

transcending it. Hence the task of the present chapter. Section I will offer comparative considerations about modern democracy and Athenian *dēmokratia*. Section II will review the early history of the word *dēmokratia*, and section III will consider the force which it had in the fourth century.

I

Democracy is not an object whose presence or absence can be recognized readily by observation. Questions about the nature of democracy in Athens, about its origin and development, are markedly different from such questions as "Were there olive trees in ancient Athens?" and "When did silver currency come to be adopted by the Athenians?" Each of the latter two questions can in principle be answered on the basis of extant evidence which rests, at however many removes, on empirical observation. The question about the beginning of Athenian coinage has led to different answers, but there is no doubt about the meaning of the question. If one asks an apparently similar question about Athenian democracy, if, for example, one asks, "When did Athenian democracy come into being?", there is room for difference of opinion, not only about the interpretation of the evidence, but also about the meaning of the question. A question about the beginning of Athenian democracy is markedly different from a question about the beginning of Athenian silver coinage.

Some historians have spoken of democracy in a Greek context as if their readers knew without explanation what they meant.[2] Others have offered a definition so vague as to have little value, for example, "The Greek word *demokratia* is the name of a form of government—government by the people."[3] Such a statement needs to be supported with an account of those institutions which, in the writer's opinion, do and those which do not amount to "government by the people," and the account of institutions must in turn be supplemented with a study of the Greek usage of the word *dēmokratia,* to show whether that usage conformed to the chosen set of institutions. Others have made decision by the vote of a majority in a primary assembly the criterion of democracy.[4] Yet others have been more cautious. They have recognized that cities which contemporaries called *oligarchiai* had a primary assembly, which took decisions by the vote of a majority. They have suggested that a

property qualification for voting in the assembly constitutes the essential difference.[5]

The validity of such views can only be determined by looking into the history of the word *dēmokratia*. In this section three preliminary points will be made. The first can be stated in the following dictum, in which each phrase will require explanatory comment:

> As far as is known, in the classical period every Greek city had a primary assembly, which took final decisions on questions of policy by vote of a majority.

Comments:

1. "As far as is known." Notoriously more is known about Athens than about any other city. The Spartans too had a primary assembly, for which the word given in a document preserved by Thucydides (5.77.1) is *ekklēsia*. Elsewhere the word may have varied; in some places it was *aliaia* and in others *alia* (page 163 below, notes 23, 24). These words are widely attested, and so the limits within which the occurrence of a primary assembly is known are broad. There is no evidence against saying that every city had a primary assembly.

2. "In the classical period." Consideration of the archaic development leading to the primary assembly of the classical period can mostly be postponed to chapter 6. But it should be borne in mind that primary assemblies occur in the *Iliad* and the *Odyssey*.[6] In the poems no vote is taken. In them sometimes at least the assembly gathers to hear the order which its commanding officer will issue. A line of development can be reconstructed from this condition to the voting assembly of the later Greek state.

3. "Every Greek city." Federations were not cities, and probably some federations entrusted final decision to a council, which consisted of deputies drawn from the constituent parts of the federation. This is true of the Boiotian federation of 447–386 and may be conjectured of some others.[7]

4. "A primary assembly." In some states membership in the assembly may have been restricted by a property qualification. This effect was achieved in Sparta by the requirement of monthly dues to the *syssitia*. In Athens Antipater imposed a property qualification in 322 (page 6 above). Even where there was a property qualification, the primary assembly was markedly different

in size and composition from a mere council. In size the Athenian assembly had a potential membership of about 9,000 even under the restriction imposed by Antipater, and the Spartan assembly in the fifth century was a mass meeting of several thousand, as far as can be discerned, in spite of the protracted decline of the citizen-population.[8] In composition, even where there was a property qualification, participation in the primary assembly was not limited to people selected by any procedure of election or sortition, and it was not restricted by any requirement of an oath. A citizen who met the property qualification could take part in the assembly in virtue of his quality as a citizen; he did not need anything additional, such as might qualify him to serve as councillor, officer, or *dikastēs*.

5. "Which took final decisions on questions of policy." Decisions on policy must be distinguished from decisions on measures proposed as new laws. As has been seen (pages 41–45 above), in Athens in the fourth century the assembly took part in the procedure for making new laws, but it did not take final decisions on proposed new laws. One can only conjecture whether other cities had a procedure for making *nomoi* distinct from the procedure for making *psēphismata*. The habit in many cities of attributing the laws to an early lawgiver suggests that they, like the Athenians, had a static concept of law. So it is not improbable that they, like the Athenians, institutionalized their concept of law by putting impediments in the way of changing the laws.

With these explanations in mind one may return to the dictum stated above. Is it true that, in the sense defined by that dictum, every Greek city was governed by a primary assembly? Some illustrations and putative exceptions call for note. Historians have sometimes called Corinth an oligarchy but have not said what they mean by that classification. A corrupt excerpt from Nikolaos of Damascus has been interpreted to mean that a council of eighty members was created on the overthrow of the Kypselidai. The interpretation is likely.[9] The creation of a council of eighty in the sixth century does not exclude the existence of a primary assembly in the fifth and fourth centuries or even in the sixth. There is no direct information about the Corinthian constitution in the fifth and fourth centuries. Therefore, importance attaches to a remark made by Demosthenes (20.52–53) about the condition in 394. After the battle of Nemea those in the city planned to exclude the fugitive troops, who included Athenians, from the city wall and open

negotiations with Sparta, but a minority opened the gates "against the will of the many" to the fugitives. If the will of the many could thus be recognized and circumvented, there was probably an organ, a primary assembly, in which that will had been expressed.

The question of the role of the primary assembly in Sparta is almost clear. Indeed it is wholly clear, as long as one restricts attention to the best evidence. Thucydides and Xenophon tell of decisions taken by Sparta on important issues in their own time. On each occasion the historians report deliberation and decision in the assembly of Spartan citizens, and they leave the reader to believe that the decision was final.[10] Doubt of the final authority of the assembly has arisen because of the last and allegedly added clause of the rhetra reproduced by Plutarch in the *Life of Lykourgos* 6. The main part of the rhetra provides that measures are to be prepared in the council and presented to the assembly for final decision. But the added clause seems to say that under some circumstances the council, together with the kings, could invalidate a decision taken by the assembly.[11] There is uncertainty about the interpretation of this clause, about its authenticity, and about that of the rhetra. It remains true that classical Spartan practice, as attested in the best evidence, conforms to the dictum under discussion.

A relatively clear exception to that dictum is furnished by the rule of the Thirty at Athens in 404/3. Even they came somewhat near to creating a primary assembly, on however restricted a basis, when they drew up a list of 3,000 men who were to enjoy full privileges. It is not clear what privileges were at first reserved to the 3,000. After a time the Thirty disarmed all who did not appear on the list. When Theramenes was about to be tried, Kritias cited a law whereby only members of the 3,000 were entitled to trial before the council of five hundred. Shortly after the execution of Theramenes the Thirty excluded from the city all who were not on the list of the 3,000. After Thrasyboulos and his followers had seized Phyle, the Thirty led the 3,000 as an armed force and some cavalry against him.[12]

The 3,000 are not known to have functioned as a political assembly. The rule of the Thirty was arbitrary. In modern terms they were a *junta*; the fifth-century word was *dynasteia*.[13] Even a *junta*, if it succeeds in maintaining itself, tends to develop habits, which from another point of view are customs. A *junta* needed some means of making its decisions known for its subjects to act on. Lacking radio, ancient rulers often summoned their subjects to a public place for the purpose of imparting orders to them. Moreover,

the Thirty restricted the bearing of arms to the 3,000 and led them into action against Thrasyboulos toward Phyle. In Greek cities a gathering of armed men for military action could easily develop into a political assembly.

Enough has been said to defend the dictum under consideration about the rule of the assembly in the Greek city. Rule by the assembly, in the sense defined, does not characterize only some Greek cities, to be called on that account *dēmokratiai*. It characterizes all Greek cities. The only exception is irregular and arbitrary regimes, such as the rule of the Thirty, and these did not last; either they were overthrown or, if they survived, they developed into more regular governments and they tended to spawn primary assemblies on the way. If anyone wishes to maintain that the constitutional development of Athens was distinctive among Greek cities because it achieved *dēmokratia*, then by *dēmokratia* he must mean something other than the rule of the assembly of citizens.

The other preliminary points to be noted here can be treated more briefly. The first concerns differences between ancient and modern meanings. As noted above, some present-day historians have spoken of "democracy" in Athens as if the meaning were known and as if the word meant the same thing both in ancient and in modern contexts. It is not possible at this point in the present inquiry to say whether "democracy" in modern English means the same as *dēmokratia* in Attic Greek. Before saying that one would have to discover what each word means. Although something will be said below about the meaning of *dēmokratia*, it would not be profitable to ask what the English word "democracy" means. It scarcely needs to be shown that the English word is used to mean many different things, often in a tendentious manner; the only secure generalization is that any foreign government supported by the United States will be declared by some journalist to be "undemocratic."

It would accordingly be nugatory to say that ancient democracy differed from modern democracy. On the other hand, it is informative to note that some ancient republics differed from modern republics in a manner pertinent to understanding their forms of government. A modern republic has a legislature and the tasks of the legislature include making laws. But as argued in chapter 3, the Athenians did not regard the laws as things to be made from time to time by a competent authority. They thought that the laws were already there. When challenged to say where the laws came from, they told of an ancient lawgiver. In the fourth century they admit-

ted that the laws might sometimes need to be amended, but they insisted that this should only be done in a reluctant and circumspect manner. If modern democracy, whatever it may be, is characterized by a habit of making laws, it differs in its concept of law from the ancient Athenians.

This consideration about the nature of law has a bearing on the remaining preliminary point. That concerns the tradition of Greek political theory. Theorizing about forms of government is first attested in a remark of Pindar: "In every constitution the straight-tongued man excels, in a tyranny, and when a city is ruled by the turbulent army, and when it is ruled by the wise."[14] The distinction is strictly numerical, between the rule of one man, the rule of the many, and the rule of the few. Since Pindar's language is allusive, he presupposed the distinction as already known. The numerical distinction was later presented more fully by Herodotos in the Persian debate on forms of government (3.80–83), by Plato (notably at *Politikos* 291c–303c) and by Aristotle (notably at *Ethics* 8.1160a31–1160b22). This distinction was the framework in which Greek political theory developed, although ideas of greater refinement were grafted on to it.

The tradition of theory which developed in this framework is for two reasons inadequate for the study of Athens. First, this tradition overlooked the Athenian concept of law. Theorists of this tradition started from the question, who is master in the city?[15] They classified authority as exercised by one man, by a few, or by many. They inquired into the means whereby the master, belonging to any of these three kinds, maintains and exercises power. The Athenians on the other hand recognized the ultimate authority of the laws. The assembly could take final decisions on policy by vote of a majority, but the assembly was only authorized to exercise authority within the limits set by the laws, and if the assembly overstepped those limits, the courts provided a remedy through the *graphē paranomōn*. It is perhaps not surprising that in composing his treatise on the *Constitution of the Athenians* Aristotle overlooked the revision of the laws, carried out in 403–399, and the legislative procedure of *nomothesia* current in his own day. Those features could not be accommodated within his framework for understanding the Athenian constitution.

Second, the tradition of political theory could not account for the judicial power as it had developed in Athens. As shown in chapter 4, the 6,000 *dikastai* were a body instituted to exercise judicial power and they were independent of all other Athenian organs.

They did not exercise authority deputed to them by another body, for example, by the demos. Consequently, Athenian orators use the term *dēmos* as equivalent to the assembly (*ekklēsia*), but they keep it distinct from the courts (*dikastēria*) and their judges (*dikastai*).[16] Limited by his preoccupation with a master in the constitution, Aristotle was unable to recognize the independence of the judiciary in Athens. Instead he assumed (notably at *AP.* 9.1) that the courts were an organ of the demos. Greek political theorists were preoccupied with assumptions which prevented them from grasping the nature of the Athenian constitution. An inquiry into the way the Athenians managed their affairs and above all into the way in which they thought about managing their affairs should start, not from the ideas propounded by theorists, but from Athenian thought and behavior as reflected by Greek historians and especially by Athenian orators.[17]

II

The word *dēmokratia* and words related to it by similarity or contrast are only a small part of Athenian public life, but scrutiny of them must rely on utterances of historians and orators. By the time of Thucydides and of Pseudo-Xenophon political utterance balanced *dēmokratia* and *oligarchia* as contrasting terms.[18] Whatever the connotative meaning, *oligarchia* clung by denotation to Lakedaimon.[19] *Dēmokratia* clung by denotation to Athens. In the Thucydidean funeral speech (2.37.1) Perikles says that the Athenian constitution is called in name *dēmokratia.* The use of the word by a pleader in court in 419/18 is, if possible, even more telling. He says that as a member of the council of five hundred he offered sacrifice and prayers "on behalf of this city" and as a member of the first prytany of the year he offered sacrifice "on behalf of the *dēmokratia.*"[20] The latter passage shows that as early as 419/18 the word *dēmokratia* could be used as a colorless designation for the current condition of the Athenians.

In other early occurrences the word is not colorless. Herodotos (3.80–83) gives an account of a supposed debate between three Persian grandees on forms of government. One of them, Otanes, argues against setting up a *mounarchos* and urges instead that they should bring about the rule of the multitude (*plēthos*). Herodotos elsewhere (6.43.3) refers to the proposal of Otanes as a proposal

for *dēmokratia*. The other two grandees, Megabyxos (3.81.2–3) and Dareios (3.82.1 and 4–5), utter the word *dēmos* to characterize the proposal of Otanes. But Otanes himself does not use *dēmokratia* or *dēmos* of his proposal. On the contrary he says (3.80.6): "The rule of the multitude has in the first place the most beautiful name of all, *isonomia*." He proceeds to contrast that condition with the arbitrary behavior of a tyrant.

Toward understanding the choice of words by Otanes one must pursue *isonomia* and Herodotean usage of *dēmokratia* a little further. Previous studies have shown that *isonomia* is "not a name for a form of government but for the principle of political equality."[21] The force of the word is clearly apparent in the drinking song in honor of the tyrannicides. Harmodios and Aristogeiton killed the tyrant Hipparchos and made Athens *isonomoi*.[22] *Isonomia* contrasts with *dynasteia*.[23] Herodotos (3.142.3) makes Maiandrios tell the assembled Samians that he disapproves of the rule of one man and that accordingly he is giving up his own rule and proclaiming *isonomia*. In the same sense Herodotos (5.37.2) tells of the first action taken by Aristagoras of Miletos, when he launched the Ionian Revolt: "In the first place in name he gave up his tyranny and created *isonomia* for Miletos." Someone less devoted to *isonomia*, a tyrant for example, might prefer a less attractive word. At the Danube Histiaios persuaded his fellow-tyrants to resist the blandishments of the Skythians and preserve the bridge for Dareios. He argued that the tyrants owed their rule to Dareios and would be overthrown if the power of Dareios collapsed; "for, he said, each of the cities would rather have *dēmokratia* than tyranny" (4.137.2). In the same sense Herodotos (6.43.3) says that in 493 Mardonios overthrew the tyrants of the Ionians and set up *dēmokratiai* in the cities.

In the last two passages considered (4.137.2; 6.43.3) *dēmokratia* occurs where *isonomia* could be expected; that is, *dēmokratia* is employed to point the contrast with the arbitrary rule of a tyrant. But this does not mean that *isonomia* is any more akin to *dēmokratia* than to *oligarchia*. On the contrary, *isonomos* can be predicated of an *oligarchia*, provided that it is not a *dynasteia*.[24] *Isonomia* contrasts with arbitrary rule, whatever the formal nature of the contrasting regime. The word *isonomia* may well have been coined in sixth-century struggles against tyranny. It approximates to the modern notion of "the rule of law," or the *Rechtsstaat*.

To return to Otanes. When he said that the rule of the multitude had the beautiful name of *isonomia*, he was, from a formal point of

view, tendentious. *Isonomia* was no more peculiar to the rule of the multitude than to other regimes, provided that they respected the law. Yet to find that the champion of a political cause expresses himself tendentiously is no great discovery. It is, however, apposite to note the word which Otanes avoids. He does not call the thing advocated *dēmokratia*. Evidently in the language of Herodotos the word *dēmokratia* does not have the implications of approval or commendation inherent in the modern word "democracy." It need cause no surprise to note that *dēmokratia* is used by someone who dislikes the condition so designated, as when Histiaios the tyrant (4.137.2) uses *dēmokratia* of the alternative to tyranny.

It must, however, be recognized that in the pages of Herodotos the word *dēmokratia* is not strongly pejorative. Herodotos as narrator employs it as a relatively neutral term. He uses it (6.43.3) for the regimes set up by Mardonios on overthrowing tyrannies in Ionia. When he wants to refer to Kleisthenes of Athens and remind the audience of the latter's identity, he calls him "Kleisthenes, the man who established the *phylai* and the *dēmokratia* for the Athenians."[25] Even so, when he wishes to commend the condition brought about by Kleisthenes, he prefers a beautiful word. As he maintains (5.78), the military achievements of Kleisthenic Athens show that *isēgoriē* is good.[26]

The history of Herodotos is the earliest extant work in which the word *dēmokratia* occurs. In his usage *dēmokratia* is a critic's term, uttered by someone who finds fault with the thing designated as *dēmokratia*. It is also a narrator's term, employed by Herodotos in a relatively neutral way. But it is not an advocate's term. When such a man as Otanes advocates a condition which others call *dēmokratia,* he prefers a beautiful word for it. In the Persian debate the word *oligarchia* behaves in a similar way. Dareios (3.82.3 and 5), criticizing the proposal of Megabyxos, calls it a proposal for *oligarchia,* and Herodotos as narrator (3.81.1) calls it a proposal for *oligarchia*. But Megabyxos avoids the word *oligarchia* and says (3.81.3): "Let us select a company of the best men and entrust them with control." By drawing together "the best" (*aristoi*) and "control" (*kratos*) Megabyxos almost says *aristokratia*.

In the pages of Thucydides *dēmokratia* and *oligarchia* behave in a similar way. In an important observation (3.82.8) the historian says that in the internal conflicts exacerbated by the Peloponnesian War the watchwords used by the two sides in conflict degenerated into empty slogans, as each side tried ruthlessly to overcome the other. The watchwords which Thucydides names are not *dēmokratia* and

oligarchia but *isonomia politikē* of the multitude (*plēthos*) and *aristokratia sōphrōn*. A passage reporting an early stage in the revolution of 411 confirms the conclusion that people advocating something which the narrator might call *oligarchia* did not call it that. When Peisandros came from Samos, the plan which he presented to the assembly is summarized in the terms "that they could have the king as their ally and overcome the Peloponnesians, if they recalled Alkibiades and did not conduct their *dēmokratia* in the same way" (καὶ μὴ τὸν αὐτὸν τρόπον δημοκρατουμένοις, 8.53.1). Continuing the report of the same meeting, Thucydides quotes Peisandros as saying that the Athenians could only win the support of the king "if we conduct our affairs in a more *sōphrōn* manner and restrict offices more to a few (*oligoi*), so that the king will trust us, and if at present we do not take more thought for the constitution than about survival (for we can carry out a reversal later, if we find something unsatisfactory), and if we recall Alkibiades, who alone among men now available is capable of accomplishing this" (8.53.3). Introducing the outcome of the debate, Thucydides says that at first the demos was displeased on hearing the proposal for *oligarchia* (8.54.1). Thus *oligarchia* is employed as the narrator's term, but Peisandros avoids it in proposing what the narrator calls *oligarchia*. He comes moderately close to it in saying that offices should be restricted to a few, but his preferred phrase urges the Athenians not to conduct their *dēmokratia* in the same way.[27]

As will be remembered, at 3.82.8 Thucydides named not *dēmokratia* but "*isonomia politikē* of the multitude" as the watchword of the other side. The deprecatory force of *dēmokratia* is illustrated by a remark of Perikles in the funeral speech. He says (2.37.1):

> We enjoy a constitution which does not envy the laws of its neighbors. On the contrary we provide them more with a model than we imitate them. Admittedly, since our constitution is administered not for a few but for the majority, it is called *dēmokratia*. Nevertheless as regards the laws everyone gets equal treatment in private disputes, and as regards public esteem, in so far as each has a claim to recognition, he is not honored for the most part because of his class-affiliation but because of his merits, and on the other hand in a case of poverty, if a man can do the state some service, he is not debarred by obscurity.

This translation employs "admittedly," "nevertheless," and "as regards" in an attempt to reproduce the force of the repeated particles *men* and *de*. Those particles are crucial for understanding the passage. Once their force is recognized, it becomes clear that Perikles cannot disclaim the name *dēmokratia* for the Athenian constitution, to which it had stuck, but he insists that the constitution has great merits in spite of its name.[28]

The word *dēmokratia,* first attested in the writings of Herodotos, was doubtless coined about the middle of the fifth century. Its behavior in the fifth century reveals complexity of meaning. It could serve as an apparently acceptable name for the Athenian constitution; this usage is illustrated most clearly by the pleader who said in 419/18 that previously as councillor he had offered sacrifice "on behalf of the *dēmokratia*" (page 98 above). Yet the same word also carried powerful overtones, sometimes of acceptance, as when Peisandros employed it as a euphemism for his proposal of *oligarchia,* but often of deprecation. The complex implications of the word *dēmokratia* in its early history cannot be recovered in full, but they should not be neglected, as they are by those who assume that *dēmokratia* was nothing but a neutral term for a defined form of government. It should not be doubted that the value of the word in political discourse derived from its complexity. That complexity had developed in lost chapters of the political history of the fifth century. It also sprang in part from the earlier history of the word *dēmos,* for that too reveals ambiguity. In Homeric and archaic verse *dēmos* is often a neutral term for the whole community, but sometimes it has pejorative force.[29]

III

The preceding section argued against the view that *dēmokratia* and *oligarchia,* as first employed, were empirically descriptive terms for forms of government. It is equally false to suppose that their meanings remained constant as time passed. On the contrary, one can trace changes in the meaning of *dēmokratia* and to some extent of *oligarchia* after the age illustrated by the history of Thucydides. The changes are on balance in the direction of greater simplicity and they may reveal a notion which was of major concern to the Athenian political mind.

In 410/9 the Athenians passed a decree in terms which Demo-

phantos had been commissioned to draft. It opened with the provision:

> If anyone overthrows the *dēmokratia* at Athens or holds an office after the *dēmokratia* has been overthrown, let him be an enemy of the Athenians and let him be killed with impunity and his property confiscated with a tenth assigned to the goddess.[30]

Much of the text of the decree consists of an oath whereby all Athenians are to pledge themselves to uphold this provision. The decree suffers from a defect not uncommon in Athenian legislation;[31] the crucial term, in this case *dēmokratia,* is not defined but taken for granted. The text does not say which of the current institutions are crucial to the constitution, in other words, what changes would amount to overthrow of the *dēmokratia.*

When the rule of the Thirty was brought to an end in 403, the word *dēmokratia* appears again in legislation as the designation for the traditional constitution. In or soon after 403/2, on the proposal of Theozotides, a decree was passed providing public support for the children of men who had been killed in the *oligarchia* when they came to the aid of the *dēmokratia.*[32] In this context there was no ambiguity; the words served as names for the losing and the winning side in the recent civil war. One of the measures instituted in connection with the revision of the laws provided that judgments in lawsuits and agreements reached by arbitration were to be valid, if they had been issued while the city had *dēmokratia.*[33] The implied contrast with the rule of the Thirty gave *dēmokratia* here denotative meaning as the word for the traditional constitution. Furthermore, the word was gaining in respectability, since the cruelties of the Thirty disgraced those whose enemies called them protagonists of *oligarchia.*

In the oratorical literature of the fourth century the words *dēmokratia* and *oligarchia* do not occur as frequently as in the writings of Thucydides and his contemporary, Pseudo-Xenophon. Evidently they were not employed so readily in political controversy. But they occur in some speeches composed toward the middle of the century and a pattern of usage can be discerned. *Dēmokratia* continues to be contrasted with *oligarchia* and it is the recognized word for the constitutional condition of the Athenians. Moreover, there is no longer any hint of deprecation or apology. The Athenians now boast of their *dēmokratia* and they try to say

what benefits it brings. One answer was that conditions in *dēmokratia* are "gentle (*praos*)." In 355/54 a pleader in court said:

> If you wish to ascertain on what account one would rather live in *dēmokratia* than in *oligarchia,* you would find this difference most obvious, that all things are gentler in *dēmokratia.*[34]

Another attempt to specify the benefits of *dēmokratia* said that it encouraged competition by rewarding merit, whereas *oligarchia* imposed equality on the privileged.[35] But it could also be said that *dēmokratia* maintained equality, whereas *oligarchia* encouraged the striving for excess (*pleonexia*).[36]

Haranguing the assembly in 351/50, Demosthenes (15.17–21) told the Athenians that they had different reasons for fighting wars against *dēmokratiai* and *oligarchiai.* They fought the former because of particular disputes, such as quarrels over parcels of land, but they fought *oligarchiai* "for the sake of our constitution and our freedom." So Demosthenes pointed out that it would be more to the advantage of the Athenians for all the other Greeks to be *dēmokratiai* at war with Athens than to be *oligarchiai* allied to Athens. For one could readily make peace with free men, but even the friendship of *oligarchiai* was dangerous, since the power-hungry few could not be well disposed to men who chose to live on a basis of equality in speech. Demosthenes added that the Athenian constitution itself was threatened, now that the people of Chios, Mytilene, and Rhodes and almost the whole of mankind had fallen into the slavery of *oligarchia.* Foreign *oligarchiai* knew that the Athenian demos would try to restore freedom, and so they set out to subvert it. Men who inflicted other injuries were enemies only of their victims, but men who overthrew constitutions and set up *oligarchiai* were common enemies of all who desired freedom. Demosthenes concluded that the Athenians in virtue of their *dēmokratia* ought to intervene in favor of restoring the same condition in Rhodes.

This passage is easy to dismiss.[37] It is echoed nowadays by the intellectual isolationist, who declaims against fascism forty years after the death of Mussolini. Yet the utterance of a tub-thumping orator is likely to bear some relation, however slight, to the deepest convictions of his audience. Some other passages suggest that *dēmokratia* could allude to convictions held dear by the Athenians

in the middle of the fourth century. One of these passages is an utterance of Isokrates:

> In most of the speeches I have delivered it will be found that I oppose *oligarchiai* and strivings for excess, but I praise equalities and *dēmokratiai,* not all of them but the ones well constituted, and that not in a haphazard way but with justice and reason. For I know that our ancestors, being in this condition, far excelled other men, and that the Lakedaimonians manage their affairs excellently for precisely this reason, that they have *dēmokratia* in the highest degree. In their choice of officers, in their everyday life and in their other customs it is evident that equalities and similarities are respected more among them than among other men. These principles are attacked by *oligarchiai* but are observed by those who have good *dēmokratiai.*[38]

The reader of Thucydides will find this passage surprising. Perhaps he will dismiss it as an eccentricity of Isokrates. But he might equally well conclude that the meaning of *dēmokratia* had changed with the lapse of half a century. Two further passages suggest that the latter course is right.

In 353/52 the speaker of Demosthenes 24.75–76 said:

> Furthermore one might recognize that he (Timokrates) committed an outrage in passing a law with retroactive force, if one considered what the difference is between law and *oligarchia,* and why men willing to be ruled by laws are considered well-behaved and meritorious, but men ruled by *oligarchiai* are effeminate and servile. One would certainly find the obvious explanation, that among men in *oligarchiai* each one has authority to reverse what has been done and give orders for the future at his own whim, but laws say what is to be observed for the future, since they are passed when those who are to obey them are persuaded that they are beneficial. But Timokrates as lawgiver in a city which has *dēmokratia* has transferred the injustice of *oligarchia* into his own law, and on past events he has claimed to be given greater authority than the judges who reached verdicts of condemnation.

Prosecuting Ktesiphon in 330/29, Aischines (3.6) said:

> You know very well, gentlemen of Athens, that among all mankind there are three constitutions, tyranny, *oligarchia* and *dēmokratia*. The tyrannies and *oligarchiai* are governed by the whims of those in control, but cities which have *dēmokratia* are governed by the established laws.

Verbal usage in these two passages is consistent. *Oligarchia* has come to mean the arbitrary rule of a *junta,* the condition known in the fifth century as *dynasteia* (cf. page 95 above). Consequently, *dēmokratia,* contrasting with *oligarchia,* has come to mean the rule of law.[39] The semantic development is easy to explain. In the fifth century *oligarchia,* like *dēmokratia,* had little factual meaning. Such factual connotation as it had derived from its opening element *olig-* = "few." An arbitrary *junta* embodied the rule of the few *par excellence.* So as time passed *oligarchia* came to have the factual and restricted meaning which had once been borne by *dynasteia.* By contrast and by consequence *dēmokratia* came to express one of the deepest convictions of the Athenians, their belief in the rule of law.

6
Toward a History of the Constitution

Haec omnis, quam cernis, inops inhumataque turba est.
—Vergil, *Aeneid,* 6.325

The preceding chapters have tried to uncover some basic attitudes held by the Athenian citizen. Those attitudes concern the way he regarded himself and his household, including its human members. They concern the manner in which he conceived the laws and their authority and the limits within which the laws allowed the assembly to determine policy. They concern also the ways in which the citizen settled disputes with his neighbors. This chapter will try to review the development of the constitution in the light of those basic attitudes. The history of the Athenian constitution has been the subject of many excellent works, such as that of Hignett. There is no intention of superseding such works here. Rather, the aim is to trace the effect of those constant concerns of the Athenians which shaped the development of their institutions. Consequently, attention will be especially directed to early and formative stages.

I

Archaeology rarely throws light on the history of institutions, but what light it does throw is important. Excavation, especially of graves, has discovered much about the process whereby Attica came to be settled in the historical period. The collapse of Bronze

Age civilization brought a sharp decrease in density of population in Greece generally. In Attica many sites were abandoned and remained empty or almost empty for centuries. But Attica experienced a sharp increase in population, possibly stimulated by improved methods of farming, in the Late Geometric period, and this was accompanied by a spread of settlement, so that the distribution of population in classical Attica had substantially the extent reached in the eighth century. The early temple of Athena on the akropolis was probably built about 700. It may mark the first emergence of some consciousness of a civic community.[1]

There had been a time when the city of Athens did not exist. Athenian institutions preserved some features derived from that early stage. The Athenians were traditionally divided into four hereditary *phylai,* and the names of these were common to Athens and some other Ionian cities.[2] It follows that the *phylai* were older than the particular cities, including Athens, where they make their appearance in the historical period. If the four *phylai* were older than the city of Athens, the same may be true of some of the *genē* and phratries. One may call to mind the legend of the Gephyraioi, who believed that they had migrated from Eretria to Attica (page 29 above). The Gephyraioi were not a creation of the Athenian state but had come into being independently of it. Similarly, the Philaidai believed that their ancestor Philaios, the son of Aias, had settled in Athens.[3] Speculation about the historicity of such legends would be fruitless, but they preserve the recognition that within the classical Athenian state there were communities of independent origin. In all probability the process of settlement in Attica was haphazard and protracted.

The classical territory of Attica was large in comparison with most Greek states and hills divided it into several plains. Athenian tradition, recorded by Thucydides (2.15), said that the territory had been unified by the legendary king Theseus. The most valuable feature of the legend was neither the name of Theseus nor his alleged activity but the recollection of the previous condition. As Thucydides says, before the unification each of the communities had had its own *prytaneion* and its own officers. They had only collaborated intermittently, when a common danger arose. Some communities had even fought wars against one another, as the Eleusinians had done against the Athenians. This observation of Thucydides implies that Eleusis had been an independent community. The celebration of the Eleusinian mysteries partly at the Eleusinion in Athens and partly in Eleusis, with a procession to the latter place,[4] surely re-

flects the amalgamation of the two communities, although no historical details can be discerned. In northeastern Attica the Marathonian tetrapolis continued sending its own representatives to Delphi at the celebration called the Pythais as late as the second and first centuries B.C.[5] This custom was evidently an institutional survival from the period of independence.

Unification of Attica must have taken a long time. One should imagine that sometimes small communities joined together to form large communities, sometimes large communities absorbed small communities, sometimes large communities amalgamated with one another by force or persuasion. The boundaries which classical Attica ultimately reached were determined partly by geographical factors, such as Mount Kithairon, and partly by historical accidents. One of the later among the accidents can be reconstructed. Toward the end of the sixth century the Plataians joined themselves to the Athenians. Herodotos says that they "gave themselves" to the Athenians; he does not say that they made an alliance with Athens but leaves the nature of the tie unspecified. Later, after the battle of Plataia in 479, Plataia was made an independent city in alliance with Athens. It seems likely that before 479 the Plataians were not allies of Athens but in some sense members of the Athenian commonwealth, perhaps on distinctive terms.[6]

Attributing the unification to Theseus, Thucydides says that that king put an end to the council-chambers and offices of the other cities and preserved for the whole territory only one council-chamber and *prytaneion,* or office building of the magistrates. In these words he refers to the council of the Areopagos and the nine archons. Certainly the outcome of unification was a unitary state in the sense that only one council and one body of magistrates survived, but Attica was still far from being a strongly unified state. The authority of the organs of the city of Athens remained weak until well into the sixth century. For most purposes the communities which mattered to the free man of the archaic period were small bodies held together by ties of locality and real or fictitious kinship. In the classical period these bodies appear in relatively uniform condition as phratries and *genē.* In the seventh century they may have been more disparate.[7]

By naming the council-chamber and the *prytaneion* Thucydides singled out the council of the Areopagos and the nine archons as institutions characteristic of the united state. There was at least one other organ, an assembly, and a little more can be learned

about archaic conditions by drawing cautiously on the Homeric poems (cf. page 77 above). Meetings of primary assemblies occur several times in the poems. When Telemachos brings about such a meeting in Ithaka, the first man to speak says that there has been no meeting of the assembly since Odysseus left twenty years before.[8] That is, in the absence of the paramount chief from Ithaka the other chiefs become independent. The unity of the state is precarious and public institutions are rudimentary.

More can be learned from the meeting of the host summoned by Agamemnon, after Zeus has sent him a dream.[9] Agamemnon first summons a "council of elders" and states his plan. Then the assembly of armed men gathers. Agamemnon addresses it and somewhat inconsequential developments follow, but after the men have dispersed, Odysseus brings them together again. After further speeches Agamemnon gives orders for a new attack on Troy to be preceded by a meal. The assembly shouts its approval. Two features in this meeting call for note. One is that Agamemnon lays his plan before the council of elders first and later before the assembly. In this order of meetings one may surely detect an early stage of a customary practice, developing into a rule in Athens, whereby each item of business had to be discussed by a council before it was presented to the primary assembly. Second, no vote is taken at this meeting or in any other assembly described in the Homeric poems. In the shout of approval with which the men greet Agamemnon's final decision one may perhaps detect, with a little imagination, the germ of the later practice of voting, but it is a very rudimentary germ. Essentially the assembly meets to receive its marching orders.

Still more can be learned from the scene on the Shield of Achilles (*Iliad* 18.497–508), which received some attention above (pages 78–81). It was noted that the scene is a trial but a trial of a rudimentary kind, for the issue has not been joined. Interest attaches here to the people who stand around shouting for one side or for the other in the dispute. Perhaps some of them were pledged supporters whom each contestant brought to the place of judgment. Others may have been uncommitted men, who lent their sympathies to one side or the other as they learned the circumstances of the case from the proceedings. As the elders offered their solutions in turn, each could listen to the shouts greeting the proposals of his predecessors; hence he could estimate the political strength of each party within the community and he could formulate his own solution accordingly. If no elder succeeded in excogitating a

solution satisfactory to both parties, if the disputants were too stubborn or the case was too difficult, each of the principals might call out his sympathizers from among the audience to assert his right by force. Thus the peaceful, but tense, scene on the Shield of Achilles is not far removed from a fight. But with a little imagination one may suppose that one day a great and anonymous reformer noticed that the side which has more men usually wins a fight, and so he suggested counting the strong right arms. This conjectural reconstruction derives some support from an occurrence at Tegea in 370. A party advocating a new policy, for creating a federation of the Arkadians, believed that they would have a majority if the public assembly met. "So they brought out their weapons." A meeting of the assembly followed.[10] Apparently for a group of men to bring out their weapons was a recognized method of making the assembly gather in Tegea. In some Swiss cantons to this day citizens attending the primary assembly wear their swords as proof of their right to vote.

The development reconstructed above from the Shield of Achilles explains how the custom arose of deciding issues by the vote of a majority in a primary assembly. The important point is that that development came about because of conflicts between equals, who could each call out their supporters from the general community. The development issuing in decision by vote in an assembly does not presuppose a conflict on class lines between an "aristocracy," working through a council, and the commoners, expressing themselves in an assembly. A hypothesis of the latter kind is in conflict with all that is known about the influence of strong families and of groups held together by ties of kinship and locality in early Greece. Indeed the term "aristocratic" should be avoided as a description of the conditions outlined in this section. Since "aristocracy" has not been defined, the word appears to give an explanation, while it merely provides a cover for ignorance. It is better to admit that the sources of power wielded by families and other groups in archaic conditions are not known.[11]

II

As noted above, Thucydides spoke of council-chambers, office buildings, and offices in describing the unification. The term "offices" (*archai*) suggests that he had in mind the nine archons.

Athenian tradition, reproduced by Aristotle (*AP.* 3.2–4), said that the nine archonships were the result of a protracted development. First there was a hereditary monarchy. Later the other offices were created piecemeal and the term of office was reduced, until there were nine archons elected annually. A reconstruction on these lines is plausible. Indeed the preservation of the title of king for one of the nine archons suggests that the starting point had been a hereditary monarchy. The development from that condition to the nine annual archonships may have begun in Athens long before the unification of Attica was far advanced. Moreover, there is some reason to think that the beginnings of judicial litigation, in which the nine archons played a part, also occurred at an early stage.

Thucydides mentions council-chambers and offices in relation to the unification but says nothing explicitly about courts, although some exercise of jurisdiction may be implied in his reference to offices. In the age of migration it is likely that each host on the move had a commander, that the commander took counsel with advisers of his choice, and that he called a meeting of his whole armed following to announce his decision and issue his orders. In settled conditions these institutions could develop into a king, a council, and an assembly. But in those settled conditions it is probable that the first steps toward creating more elaborate institutions occurred when judicial litigation began to replace self-help. The theory of Wolff on the origins of judicial litigation should be called to mind (page 80 above). That is, it should be supposed that a man suspected of committing a private delict flees from the aggrieved man, who is bent on retaliation, and seeks the protection of a public officer. The latter extends temporary protection to the fleeing defendant and calls a court into session to determine whether the act of self-help is justified. In Athens it should be supposed that homicide was the earliest matter on which public authority intervened to restrict private retaliation. For the *ephetai,* the older of the courts for homicide, differed at least in title from the *hēliastai* or *dikastai,* who were the classical judges in all other trials;[12] this divergence suggests that the *ephetai* were the older body of judges. The homicide courts met under the presidency of the king-archon. That is, on Wolff's reconstruction, the public officer who extended temporary protection to the alleged killer was the king. So an Athenian king may have called the *ephetai* into session and charged them to determine whether the act of homicide

was involuntary, long before many of the nine archonships had come into being and long before Athens ruled the whole of Attica. One cannot conjecture how an Athenian king hit upon the device, fruitful for the whole development of Athenian justice, of creating an independent body to judge cases of homicide.

In the fourth century many of the nonceremonial tasks of the nine archons were judicial. That may have been true of most of them, with the possible exception of the polemarch, from the start. In particular, the title of the *thesmothetai* suggests that they had to do with law, although its precise interpretation is uncertain.[13]

A little more can be said about status and jurisdiction in pre-Solonian Athens. If the court of the *ephetai,* hearing a case of homicide, found for the plaintiff, their judgment said that the plaintiff was entitled to continue the act of self-help which he had begun. The temporary protection, extended to the defendant by a public officer for the duration of the trial, was brought to an end. In other words, a finding for the plaintiff deprived the defendant of protection. In the laws of Solon the penalties imposed by the state were negative. It could pronounce a curse against the criminal or it could deprive him of protection.[14] A man deprived of protection was said to be *atimos* as opposed to *epitimos.* Demosthenes (9.44) mentions a provision of the laws on homicide that in some circumstances a man can "be killed *atimos.*" That is, in view of the derivation of *atimos,* the man is without worth and if he is killed, no wergild is due. The *atimos* was an outlaw.

In early archaic society protection was of crucial importance. A powerful man maintained a following and protected them. If he failed to protect them, they were likely to desert him for another patron. A humble man depended on a powerful man for security. A stranger was totally vulnerable. When Odysseus was cast ashore in Phaiakia, he was fortunate in that Nausikaa, who found him, had high principles. She said that all strangers and beggars come from Zeus.[15] They had no human protector, and if one ill-treated them, one had only the vengeance of Zeus to fear. Folktales preserved in the Homeric poems and elsewhere told repeatedly of the man who had committed an outrage in his native land and fled to a distant place, where he sought the protection of a king or a powerful man. If the king accepted him and took him into his service, the new relationship could be advantageous to both parties, since the fugitive was totally loyal to his protector.[16]

The story of the growth of courts in Athens is the story of the

process whereby private protection yielded to public jurisdiction. From Solon's law of amnesty it is clear that the process had already advanced some distance. The law reads:

> Those who were *atimoi* before the archonship of Solon are to be *epitimoi,* except those who were in exile, when this law was issued, on account of the Areopagos or of the *ephetai* or of the Prytaneion after a judgment proclaimed by the kings, on grounds of homicide or massacre or attempted tyranny.[17]

The list of exceptions recognizes two offenses. One was (attempted) tyranny, which was judged by the Areopagos.[18] The other was homicide and massacre, judged under the presidency of the king-archon by the *ephetai* or at the Prytaneion by the head men of the traditional *phylai* (cf. page 72 above). The law of amnesty has a good chance of being an authentic law of Solon, both because of the asymmetry of its wording and because it mentions his archonship. It confirms the theses that a finding for the plaintiff in a case of homicide had the effect of declaring the defendant *atimos*; that is, protection was withdrawn from him, he was abandoned to the vengeance of his victim's relatives, and his only chance of survival was to escape into exile. The law shows that the delicts recognized as matter for trial included homicide, massacre, and attempted tyranny. It does not exclude the possibility that other delicts were already recognized and tried, their perpetrators being among the beneficiaries of the amnesty, but its silence suggests that any other delicts already recognized were few.

The law has an implication also for the study of the types of status recognized in early Attica. It distinguishes between protected persons (*epitimoi*) and outlaws (*atimoi*). It says nothing about other possible distinctions, for example, between citizens and aliens or between free men and slaves. One may well infer that in the pre-Solonian law of delict the only distinction recognized was that between protected persons and persons lacking protection. Doubtless actual protection still depended primarily on a personal protector, but through the courts public authority was already encroaching on this private sphere. It asserted a right to determine when, in consequence of the finding of a court, protection should be terminated.

III

In each of several Greek states the classical inhabitants said that their laws had been written for them at an early period by a lawgiver, whom they could name. Among such lawgivers were Zaleukos of Italiote Lokroi, Charondas of Katana, and Lykourgos of Sparta.[19] The Athenians were exceptional in believing that they had had, not one early lawgiver, but two. Aristotle (*AP.* 4.1; 7.1) met this oddity of the tradition by supposing that Drakon first wrote a comprehensive code of law and later Solon superseded it on all matters except homicide, on which Drakon's laws were kept. This opinion fails to explain why the Drakontian laws on homicide, and only the Drakontian laws on homicide, were kept. Moreover, the opinion reeks of fourth-century rationalism.

There are further difficulties. Several excerpts of laws are attributed to Solon, are archaic in wording, and seem very likely from their content to belong to laws on homicide.[20] It is difficult to escape the conclusion that there were Solonian laws on that subject. Again, although the tradition on the date of Drakon's activity points uniformly to 621/20, it is late.[21] It may rest on the studies carried out by Apollodoros in the second century B.C. There is no compelling reason to suppose that it has an earlier origin. In particular, Aristotle puts the activities of Drakon before those of Solon but does not say how many years elapsed between them.[22] Presumably he did not know. Furthermore, the laws on homicide attributed to Drakon deal with a considerable variety of questions. In the inscription of 409/8, which sets out to reproduce "the law of Drakon on homicide," the extant part of the text includes provisions on unpremeditated homicide, on *aidesis,* on the initial proclamation against the killer, and on the degree of kinship within which the victim's relatives were authorized to join in the prosecution. It is not likely that all these questions came to require legislative regulation at the same time. This difficulty grows still greater when one turns to the lengthy discussion of the laws on homicide by Demosthenes (23.22–85). He discusses a great many laws and attributes them to Drakon.[23]

The difficulties disappear when one notes that Drakon, though a possible Athenian name, is also a Greek word meaning "snake," and the Athenians worshipped a sacred snake on the akropolis. The laws of Drakon were, then, originally the laws issued on the authority of the sacred snake. This hypothesis explains how laws

on homicide could be issued over a long period and hence provide a great variety of rules. Real snakes sometimes live a long time. Imaginary snakes—and this one probably was imaginary—are immortal. The same hypothesis explains why Aristotle did not know the interval of years between the work of Drakon and that of Solon.[24] It frees the Athenians from the anomaly of having two early lawgivers. It achieves these advantages without having recourse to rationalistic fantasy. It leaves open the question, who first issued in writing a comprehensive code of homicide law. If the answer to that question is Solon, that explains why some provisions on homicide are attributed to him.

Reconstruction of the work of Solon depends on assessment of the sources. Recent studies have tried to show that the laws of Solon could have been preserved with accuracy.[25] It does not necessarily follow that they were so preserved. The problem is complicated by the classical habit among the Athenians of referring to the current laws as laws of Solon. Pleading in court in 400/399, Andokides (1.95–96) cited a law which penalized anyone who might hold office after the overthrow of the *dēmokratia*. Andokides called this a law of Solon. To reinforce his point Andokides required the herald to read out the law. It is preserved in the manuscripts of the speech and the opening phrases show that the law was passed in the year when Kleigenes was the first secretary of the council, that is, 410/9. The same habit of speaking of Solon as the author of all current laws persisted long after the revision of the laws was completed in 403–399. In 355/54 a pleader in court made Solon the author of the judicial procedure *graphē nomon mē epitēdeion theinai*.[26] Perhaps one may compare the belief of many Frenchmen that they are governed wholly by the Code of Napoleon.

Aristotle (*AP*. 5–12) and Plutarch (*Life of Solon*) each offer careful accounts of Solon's work, but for the reason given in the preceding paragraph these must be approached with caution. It can be shown that some specific statements of Aristotle about Solon are very likely to be wrong. In a passage difficult to interpret in detail Aristotle (*AP*. 10) says that Solon altered the standards of weights and measures and the coinage. The archaeological record does not support Aristotle.[27]

By far the surest source of information about Solon is his own poems. Considerable passages have been transmitted. Most of them are too vague in their language to satisfy the student of Solon's public work. But one of them (fr. 36 West) may yield some significant information. It is preserved by Aristotle (*AP*. 12.4) and con-

sists of twenty-seven iambic trimeters. It appears to be complete and to give an apologetic review of the author's activity. The first seventeen lines describe and defend the *seisachtheia,* the act of economic liberation. The next two lines and one word say: "I wrote laws (*thesmoi*) alike for the bad man and the good, fitting straight justice into each." The remainder of the poem offers generalities to the effect that Solon did not join either of the opposed sides or thereby precipitate violence.

Several things can be inferred from this poem. First, Solon says far more about the economic liberation than about the rest of his work. So it is to be presumed that the *seisachtheia* was more controversial and more innovatory.[28] Second, Solon's word for his laws was *thesmoi.* The word for "laws" in classical Attic was *nomoi.* The difference in meaning need not be scrutinized here.[29] What calls for note is the reference to the laws of Solon in the decree proposed by Teisamenos in 403/2.[30] The opening clause provides that the Athenians shall observe the *nomoi* of Solon and the *thesmoi* of Drakon. That is, as late as 403/2 the Athenians recognized a distinction between *thesmoi* and *nomoi,* but they had taken to calling the laws of Solon *nomoi,* contrary to his own practice. This fact should give pause to those who hold that the laws of Solon were preserved with verbal accuracy.

The most important conclusion to be drawn from the poem under consideration arises from the lines translated above. Except in reference to the *seisachtheia,* Solon was content to state and defend his public activity by saying that he wrote laws. That is, his essential task was to reduce the laws to writing. Possibly the enterprise was not entirely new. Perhaps some *thesmoi* (or *thesmia,* whatever those were) had been issued in writing by the *thesmothetai,* and these may have included measures issued from time to time on the authority of the *drakon* which the Athenians worshipped on the akropolis. But the implication of Solon's words is that there was plenty of work for him to do when he set about writing the laws down. Again it may be impossible to avoid making some innovations in the course of reducing customary law to writing. Perhaps one can even recognize occasionally points in the extant fragments of Solon's laws where innovation should be suspected. His law of bequest, for example (page 27 with note 69 above) appears to clarify existing institutions in a manner which could not avoid making modest changes. But this consideration does not alter the nature of the task as conceived by Solon and his contemporaries. The poem shows that, except in the matter of economic liberation, Solon did

not set out to make major innovations, and on concluding he did not boast of having made major innovations.

One should therefore shun theories which say that Solon made major innovations, apart from the *seisachtheia,* and that the importance of his work arose from such innovations. One should reject the view that he altered the way civic organs functioned by creating an annual council of four hundred. One should equally reject the view that he altered the qualifications for public office by introducing classes based on property.[31] It is better to believe that the four classes were traditional. Their very names, reported by Aristotle (*AP.* 7.3), indicate that they had arisen in more than one step. For the name of the highest class (*pentakosiomedimnoi*) refers etymologically to a qualification by produce of land, but the other three names (*hippeis, zeugitai,* and *thetes*) do not. It is credible that recognition of property as the qualification for office had come about in the long process of unification, when the institutions of the different communities were adjusted to one another.

A subsidiary question calls for note in connection with the property-classes. After alluding to the privileges of the three higher classes, Aristotle (*AP.* 7.3) says: "To those of the thetic class he granted a share in the assembly and the courts only." Some have taken this to mean that Solon first empowered the *thetes* to attend the assembly and vote.[32] That interpretation is not necessary. "Granted" (*metedōke*) may mean "allowed," and the point of the sentence may be in its last word, "only." Admittedly as late as the fourth century the standard Athenian citizen, the type of man whom every citizen aspired to be, was the man who owned at least a modicum of land (page 30 above), but until 322 the landless majority had full rights of participation in the assembly and the courts. It was argued above (pages 110–11) that decisions came to be taken in the assembly because powerful men brought their followers to fight for them. A powerful man, calling out his followers, would not be likely to add that those who owned no land must stay at home. In early conditions the capacity to participate in the assembly surely depended on enjoying effective protection.

That Solon reduced the laws to writing is the most substantial element in the tradition about him. Aristotle also says that he created the *dikastēria.*[33] As the oath sworn by *dikastai* shows, the Athenians thought that the laws provide for some eventualities and the court must fill in the gaps between the laws by deciding other cases (page 69 above). So it would make sense to suppose that Solon wrote the laws down and created the *hēliaia* to determine

cases not covered by the laws. These two activities would be the essence of his work (apart from the economic liberation). Yet the possibility cannot be excluded that the *hēliaia* existed already before the time of Solon. The main reason for entertaining this possibility is the strong probability that the six *thesmothetai* had already come into being.[34] Judging from their classical functions, there would have been little for the *thesmothetai* to do if there was no *hēliaia*. It is perhaps prudent to suppose that litigation before the *hēliaia* took place even before the time of Solon. The publication of a written code of law may have had the effect, perhaps unintended, of increasing the role of the *hēliaia* by prompting people to bring more disputes to court.

IV

The best evidence on the nature of political conflicts in archaic Athens is provided by Herodotos in his account (1.59–64) of the rise of Peisistratos. Herodotos wrote before the tradition was corrupted by the learned speculations of the Atthidographers. He tells of moderate rivalry between two groups, led by Lykourgos and Megakles, and bearing names which reflect geographical areas, "the men of the plain" and "the men of the shore." Peisistratos upset this balanced situation. He organized a following of his own, "the men from beyond the hills" (*hyperakrioi*), and intruded himself. Late sources provide the valuable information that Peisistratos came from Brauron, which is divided from Athens by hills.[35] The account is readily intelligible when one recalls that Attica is a large territory, divided by hills into several plains. As Thucydides said (2.15.1–2; pages 108–9 above), in consequence of the unification the local councils and offices of the communities absorbed into Athens were disbanded. The officers and council of the city of Athens acquired competence for the whole territory. The assembly and the courts met in the city. It was far more difficult for men powerful in the outlying plains to take part in the organs of the city and bring their followers to the assembly than it was for powerful men of the plain of the city. Regionalism, the resentment felt by leading men of the outlying plains, accounts for the subversive intrusion of Peisistratos into the gentlemanly rivalry of Lykourgos and Megakles.[36]

Peisistratos expressed the resentment of men from the east. Con-

jecturally, western regionalism may be discerned in the earlier rising of Kylon. The latter had some troops supplied to him by his father-in-law, Theagenes of Megara. He occupied the akropolis. After he had installed himself, the Athenians "perceived what had happened and rallied in full force against him."[37] Apparently they had not perceived what was happening or rallied against Kylon while he was leading the men of Megara to the akropolis. This fact can be explained, if Kylon originated from the plain of Thria and expressed the regionalist resentment of western Attica. But certainty is impossible.

Regionalism explains the first attempts of Peisistratos and his early failures. Since he was the leader of a part only of Attica, men from other parts of the territory, including the plain of the city, were willing to oppose him. Regionalism does not explain his later success or that of his sons. During his exile he cultivated foreign friendships, notably in Thebes, Eretria, Argos, and Naxos, and he raised funds, probably by mining precious metals in the neighborhood of Mount Pangaion in Thrace. In 546 he led a private army to land at Marathon. Advancing toward Athens, he defeated his enemies at Pallenis and made himself master of the city.

Peisistratos and his sons refrained from altering the laws or the offices.[38] They ingratiated themselves with Athenians of all types. Doubtless the financial resources of Mount Pangaion gave them the wherewithal to achieve this, and exploitation of the silver mines at Laureion probably began about this time. The rule of the tyrants brought the first opportunity for Athenians from all parts of Attica to take pride in the power of their city. Peisistratos undertook ambitious enterprises abroad with success. Settlements were sent to the Thracian Chersonese and to Sigeion. The tyrant carried out a ceremonial purification of the island of Delos. The Athenians believed that they were the oldest land of the Ionians, as Solon put it. Delos was the sacred island of the Ionians. The purification gave visible expression to the Athenian assertion of seniority. Greek society was always sensitive to display and prestige.[39] At home, too, the display of magnificence, customary among early tyrants, attracted Athenian attention toward the central power. Poets, including Anakreon of Teos, Lasos of Hermione, and Simonides of Keos, were entertained at the court of the tyrants. Temples, altars, the *stoa basileios,* and other buildings were erected. Festivals were introduced or enlarged. The Greater or City Dionysia were probably founded by Peisistratos, and there, about 534, at the choral competitions in honor of Dionysos Eleuthereus,

Thespis introduced an actor distinct from the chorus and its leader, a step toward the creation of tragedy.[40]

It may be presumed that such measures contributed to the growth of civic consciousness among the scattered inhabitants of Attica. But one must beware of exaggerating their effect. Power as exercised by Peisistratos and his sons was personal and familial, not institutional. Sigeion, once conquered, did not become a possession of the Athenians but a personal fief ruled by a son of Peisistratos, and the family retired thither when it was expelled from Athens. The Chersonese was ruled in a similar way by the sons of Kimon, who had achieved reconciliation with Peisistratos, and the younger son, Miltiades, remained there until 493, long after the regime of the tyrants in Athens had fallen. The Greater Dionysia were celebrated in honor of Dionysos Eleuthereus, and the most likely explanation for the choice of this deity is to be found in the connections of the legendary ancestors of Peisistratos with Eleutherai in northwestern Attica.[41]

V

So far this chapter has traced steps taken by the Athenians toward developing a united commonwealth. The steps included the supersession of local councils and offices by the council and offices of Athens; the institution of courts, first the *ephetai* and later the *hēliaia,* and perhaps some growth in the latter's jurisdiction; and the issuing of a written code of law. The tyranny contributed somewhat to the greater unity of the Athenians by diminishing the influence of those magnates who competed with the Peisistratidai and by providing a single focus of loyalty, but that focus was personal, not institutional. In approaching the reforms of Kleisthenes, which were carried some years after the expulsion of the Peisistratidai,[42] the question to be borne in mind is that of continuity or revolution: did the reforms continue development in the same direction or did they divert it into a new direction?

The sources available on the work of Kleisthenes are good and informative. Herodotos (5.66–81, 89–94) narrates the conflicts during which the reforms were carried. There is no independent evidence to support Herodotos's story, since Aristotle's account (*AP.* 20) of the conflicts is derivative, and it may be that the oral tradition had become somewhat distorted by the time it reached Hero-

dotos. But his narrative is intrinsically plausible and there is no positive reason to doubt any of it. On the content of the reforms Aristotle (*AP.* 21) provides basic information. Since the reforms remained in force in his own time, he had but to look around him to find out their essential features. Controversies of the present day concern, not the content of the reforms, but their purposes and significance.

Kleissthenes carried his reforms during rivalry with Isagoras. The reforms gave him ascendancy so decisively that Isagoras had to appeal to king Kleomenes of Sparta for help. The reforms recognized 139 demes as the smallest units in the commonwealth and distributed them to form ten *phylai,* in such a way that each *phylē* had demes from each of the three areas of Attica. This tripartite structure of the *phylai* distinguishes Athens from other ancient republics, notably Rome and Sparta, which introduced *phylai* of territorial type within the archaic period. The reforms of Kleisthenes also created the annual council of five hundred, of which the members were chosen by sortition, fifty from each *phylē.* Each deme had a permanent number of places in the council, and the number reflected approximately the size of the deme. It cannot at present be decided whether the classical division of the council into ten *prytaneiai* for organization of its work goes back to Kleisthenes.

Since the reforms enabled Kleisthenes to gain ascendancy over his rival, any theory which does not allow them a partisan character is mistaken. It should also be observed that the regionalist conflicts, which had disturbed Athens earlier and may account for the rivalry of Kleisthenes with Isagoras, did not recur later. It is accordingly easy to suppose that the reforms brought regionalist conflicts to an end by ensuring victory to the reformer's region, the plain of the city. How the reforms accomplished this is not yet fully clear, but continued inquiries have diminished the area of uncertainty. Study of the location of particular demes suggests that the Alkmaionidai, the family of Kleisthenes, could organize their supporters to gain ascendancy in three of the new *phylai,* and that in other parts of Attica Kleisthenes divided areas loyal to his rivals between different *phylai.* The several assemblies of the ten *phylai* may have had larger functions at first than in the fourth century, when there is more evidence. The council of five hundred facilitated efficient discharge of business by the assembly; this was to the advantage of those leading families who could readily bring their supporters to the city, since the assembly met in the city. In

consequence of the tripartite structure of the *phylai* the rule of candidature for the archons and the *stratēgoi,* whereby one was to be chosen from each *phylē,* could work in the interests of the same families.[43]

Some recent studies have emphasized the military aspect of the reforms.[44] Undoubtedly the reforms enabled the state to draw efficiently on the man power available for armed enterprises. Shortly after the reforms were carried the Athenians defeated the Boiotians and the Chalkidians, and Herodotos (5.78) noted that this success contrasted with their previous record. Indeed it is likely that before the reforms of Kleisthenes the Athenian state itself had never undertaken military or naval expeditions; the expeditions in which Athenians had taken part had been private ventures, initiated and led by individual men of power.[45]

To return to the question of continuity, several observations need to be made. First, in the past the tendency to portray the Kleisthenic reforms as revolutionary has rested on the assumption that archaic Athens had a firm and articulate political framework, in which different interests could compete for the exercise of power. On this assumption it has made sense to ask whether Kleisthenes moved Athenian development from an "aristocratic" to a "democratic" direction. But the meaning of such key terms is obscure; they are more impressionistic than descriptive. Moreover, the preceding sections of this chapter have tried to show that archaic Athens did not have a firm or articulate political framework. The Athenians were not competing for power within institutions already highly developed; they were developing institutions from rudimentary beginnings. If that is so, the reforms of Kleisthenes made a large and unpredictable step forward in the direction which the Athenians were already taking. The demes furnished a relatively uniform basis of local administration for all parts of Attica. The new *phylai,* an artificial creation of the state, taught Athenian hoplites to work together. The council of five hundred, in which membership was annual, accustomed men from the different parts of Attica to collaborate in reviewing business for the assembly.

Second, in their military aspect the reforms were pregnant with consequences for Athenian development in the fifth century. In consequence of the reforms the Athenian community, as distinct from particular Athenians with their followings, was able to make its weight felt in disputes between Greek cities. This ability to exercise power internationally generated the ambition to do so on an ever-increasing scale.

Moreover, continuity in the growth of the Athenian state through the reforms of Kleisthenes can be elucidated further, if attention is paid to the development of Athenian citizenship. By the fourth century extensive privileges distinguished citizens from aliens, including resident aliens. The citizen had political privileges, including membership in the assembly and eligibility for office and for service in the *dikastēria*. His private rights included capacity to own real property in Attica. The law gave his life different protection than it extended to aliens, for the charge of killing a citizen intentionally with one's own hands was heard by the council of the Areopagos (page 72 above). Citizens alone were entitled to such financial payments as the theoric distributions current in the time of Demosthenes. In short, citizenship was rich in content. Some of the steps whereby the content of citizenship had grown can be specified. For example, the introduction of payment for dikastic service and for tenure of civil offices in the middle of the fifth century (page 133 below) added to the advantages which citizens enjoyed over aliens, and citizenship acquired the capacity for membership in the council of five hundred when Kleisthenes created that council.

If one could trace the condition of the Athenians backward through the archaic period, one would surely find that citizenship appeared poorer and poorer in content as one directed attention to ever earlier times. Solon's law of amnesty (page 114 above) distinguishes between protected persons and outlaws. Before the time of Solon that was the salient difference among free persons. A law attributed to Solon and reported by Plutarch shows the Athenian state beginning to assert a claim to be the sole source of protection. Plutarch's account of the law says:

> The law about naturalized citizens gives rise to a problem of interpretation. It does not allow people to become citizens (*politai*) unless they were in permanent exile from their native land or settled in Athens with their whole households (*panestioi*) for the purpose of practicing a craft.[46]

The authenticity of this law is not wholly clear. That it was indeed the work of Solon has been maintained on the grounds that the word *panestioi* is unique in Plutarch's writings.[47] But that need only imply that the measure was a genuine law of archaic Athens, not that it was strictly the work of Solon. It may have been a

measure instituted some time after Solon's activity or even an earlier rule which he adopted into his code.

The law is not likely to have been an invention of the classical period attributed erroneously to Solon. For in the classical period immigrants, including those of the two kinds favored in the law, did not become citizens; they became metics. The offer of citizenship to them in this law diverges so much from classical practice that one may doubt whether the word "citizens" (*politai*) was the term used in the law. Plutarch's account is a paraphrase, not a quotation, and the operative word may have been some term implying protection. If, however, the word *politai* occurred in the law, it sprang from a concept of citizenship far less exclusive and therefore markedly different from that of the classical period.

The law can be readily understood in the light of Greek folktales on the theme of the fugitive (page 113 above). They tell of a stranger who seeks protection from a powerful man. The law replaces the powerful man with the state as the source of protection. One may doubt whether this exclusive claim of the state was respected during the rule of Peisistratos and his sons. Surely the poets who sojourned at the court owed their safety to the might of the tyrants.

Considered together, Solon's law of amnesty and the law attributed to him on immigration reveal a condition in which citizenship was merely embryonic. Accordingly, when Kleisthenes organized the Athenians by *phylai* and demes, his work brought about a large increase in the content of citizenship. His achievement was not only a comprehensive organization of the Athenians. In addition, civic obligations, including the duty of military service, were formulated; possibly the obligation of military service to the state was imposed for the first time. Doubtless this burden brought with it the prospect of benefiting, by booty or conquest, from military campaigns. It is not clear how extensively the Kleisthenic reform absorbed the free inhabitants of Attica into demes and *phylai*. The victories achieved over the Boiotians and the Chalkidians shortly afterward suggest that Kleisthenes drew on large reserves of man power.[48] There is no strong objection to the belief that Kleisthenes included all free inhabitants of the territory in the demes and the *phylai*.[49] If so, only one thing was still lacking for a fully developed notion of citizenship. That was a clear distinction between citizens and resident aliens. The word *metoikos* is first attested in the plays of Aischylos and in an inscription of about 460.[50] The law of 451/50,

providing that a child should only have citizenship if both its parents were citizens (pages 23–24 above), may have been one in a group of measures in which the notion of citizenship crystallized.

If the work of Kleisthenes is thus placed in the history of Athenian citizenship, the question of continuity or revolution admits an unequivocal answer. The reforms gave greater articulation to the institutions of the city and far greater cohesion to the Athenians as a commonwealth. Steps had been taken in this direction long before, notably through the creation of courts for homicide and later for other disputes and through the issuance of a uniform code of law for the whole territory. The rule of the tyrants had both furthered and impeded the emergence of a community of citizens. They had furthered the process by diminishing the claims of smaller associations on the loyalty of their members. They had impeded it by filling with personal power a void where the authority of civic institutions was to grow later. The work of Kleisthenes was a large and resolute step forward in the direction in which the Athenians had been moving in a more hesitant manner since long before.

VI

For a long time after the measures of Kleisthenes the development of the Athenian state was dominated by the desire of the Athenians to make themselves felt abroad. The story, well known in outline, begins with the dispatch of twenty ships to help the Ionian rebels in 499; the expedition was large in proportion to current resources. Athenian confidence was increased by their defeat of the Persian expeditionary force which landed at Marathon in 490. Meanwhile the Athenians were involved in a protracted conflict with their powerful neighbor, Aigina. The discovery of a rich vein of silver at Laureion in 483 enabled them to undertake a massive enlargement of their war fleet. The consequence appeared in the resistance to the operations of Xerxes and of Mardonios in 480 and 479. The fighting on land was decisive and the outcome can be explained by the superior equipment and better discipline of the Greek hoplite. But the feature of the fighting which could not be anticipated was the naval victory at Salamis. The Athenian contingent, which formed a large part of the Greek fleet, had been built recently and the crews mostly had little experience. Yet they de-

feated a Persian fleet which included well-trained contingents from Phoenicia and Egypt.[51]

Composing an ode for an Aiginetan victor in 480 or 478, Pindar dilated on the achievements of the Aiakidai. He alluded to the recent victory at Salamis but added (Isthmian 5.51–53): "Yet steep the boast in silence. Zeus accords some things and he accords other things. Zeus is master of all." As he had said earlier in the same ode (line 16), "mortal thoughts become mortals." This response to the battle of Salamis was in accordance with the main tradition of Greek thought. The response of the Athenians was markedly different. In 478/77 they founded the organization which has come to be called the Delian League: "The acknowledged purpose was to exact vengeance for their sufferings by ravaging the king's land."[52] The Athenians pursued a forward policy, bringing more cities into the League. By defeating the Persians on the Eurymedon River in 469(?), they put an end to Achaimenid plans of conquest in European Greece.[53] They increased their authority over their allies. By about 460 their ambitions brought them into armed conflict with Sparta and even more with some of the allies of Sparta. When the war was brought to an end in the Thirty Years' Peace of 446/45, the Athenians were patently an equal rival of the Spartans.

The growth in the international power of Athens in little more than half a century had been enormous and spectacular. The obvious effect on Athenian institutions was an increase in the significance of the generalship or *stratēgia.* As a regular annual office this board had begun to function in 501/0. Ten *stratēgoi* were elected by the assembly of citizens and at first one was chosen from each of the *phylai.*[54] They were military experts and so there was no restriction on re-election. From the start they were general officers rather than regimental officers; in Herodotos's account of the campaign of Marathon, although each general commands the contingent supplied by his own *phylē,* the generals appear primarily as a council advising the polemarch. The latter officer is not known to have commanded in the field after 490. The generalship was flexible and could be adapted to the growing demands of military and above all of naval enterprise. The rule of candidature was modified, so that in some years two *stratēgoi* were elected from the same *phylē.*[55] When the assembly resolved on an expedition, it drew from the current board of *stratēgoi* a number of commanders proportional to the size and difficulty of the operation. The narrative of Thucydides provides plentiful illustrations. Because of the increase of the military and political significance of the *stratēgia,* it became the chief prize open

to the ambition of men pursuing a public career. Men whose ancestors had held the *stratēgia* enjoyed the informal respect of their fellow-citizens.[56] A candidate defeated at the election of generals was likely to entertain bitter resentment.[57]

In 487/86 the Athenians introduced the practice of choosing the nine archons by sortition. The evidence on the previous mode of choice diverges. The most defensible view is that until 487/86 the archons were uniformly chosen by election in the public assembly.[58] Herodotos (6.109.2) says that Kallimachos, who commanded at Marathon, had been chosen polemarch by sortition. An attractive explanation supposes that until 487 the men who were to hold the nine archonships were chosen by election, but after election they distributed the different offices among themselves by casting lots.[59] One may well compare the praetors of the Roman Republic. These were chosen by election and after election they cast lots for their provinces. In the light of the comparison one need not seek for a specific reformer, such as Kleisthenes, with a specific purpose to initiate the custom whereby the elected archons cast lots for the particular offices. Nor need one suppose that that custom diminished the powers of the archons in any way. The praetors exercised large and in some circumstances formidable authority.

The introduction of sortition for choice of archons in 487/86 is another matter. Purpose and effect must be distinguished. One cannot hope for direct evidence on the purpose. But people who spin a coin recognize that something of value is to be assigned to one or a few among many people, who are all equally entitled to it; no one can feel aggrieved if the choice is left to chance. It is credible that before 487/86 elections to the archonships aroused intense competition, leading to disorder, although extant evidence for the disorders refers to a period a century earlier.[60] Those who hesitate to follow this explanation for the adoption of sortition in 487/86 may call to mind a remark of Aristotle (*Politics* 5.1303a15–16). He says that at Heraia in the Peloponnese sortition for the choice of officers was introduced in order to put an end to excessive and corrupt competition among candidates.

To estimate the effects of the introduction of sortition at Athens one must note first the probability that a minimum age of thirty was required for the archonship, as for other offices.[61] Nine or, after the reforms of Kleisthenes, ten positions were to be filled each year. It should be expected that Athenians would seek the archonship when they reached the required age or soon after. The archon-

ship would be an office for a politically young man. If he was to attain major influence at all, that stage would be reached some years after the archonship. This expectation is confirmed by the careers of the few archaic archons whose ages at the time of holding the office can be estimated. Miltiades was archon in 524/23. He was sent to the Chersonese several years later. He was still vigorous enough to serve as general at Marathon in 490 and lead an expedition against Paros in 489.[62] Kleisthenes was archon in 525/24, but as far as is known, he first engaged in major activity more than ten years later.[63] No archon can be shown to have been old at the time of his archonship.

An important study has assembled the names of forty-three eponymous archons, who span the year 487/86.[64] Fifteen of those known were chosen before the reform of that year and twenty-eight of those listed (through 457/56) were chosen after it. Those chosen before 487, like those chosen afterward, were men of no great political consequence at the time of their archonships. This was to be expected, if the archonship marked, not the culmination, but an early stage in a political career. One would expect that the archonship attracted men of talent and ambition, as long as it was filled by election, but that it ceased to do so once it was filled by sortition. The meager record of names conforms to this expectation. Of those chosen before 487 two, Hipparchos and Themistokles, were sufficiently ambitious to be ostracized later,[65] but there are no indications of talent or ambition among archons chosen by sortition. One should conclude that the change of 487/86 had the unintended effect of weakening the personnel of the Areopagite council, which consisted of the men who had held the archonships.

Twenty-five years later Ephialtes carried reforms which in some way weakened the council of the Areopagos. The discovery of the Aristotelian treatise *The Constitution of the Athenians* provided an account which is in some ways precise. The author says (25.2):

> In the archonship of Konon (462/1) he [Ephialtes] deprived the council of all the additional powers, through which it had guardianship of the constitution. He gave some of these to the five hundred and others to the assembly and the *dikastēria*.

The statement gives a date and says which organ lost powers and which organs gained powers. But the author does not say what the

powers were, beyond calling them "additional," an epithet which merely adds another riddle. Scrutiny of the tradition on Ephialtes and the Areopagos arouses further suspicion. The earliest evidence for his attack on the Areopagos comes from writings composed by Aristotle in the second half of the fourth century. About 356 Isokrates had composed the *Areopagitikos* (7), in which he attributed to the Areopagos at an earlier date supervision of the education and general behavior of the citizens. About the same time Kleidemos composed his *Atthis* and the Athenians began attributing the creation of *dēmokratia* to Solon. It seems likely that the large role assigned to the pristine Areopagos and correspondingly the extensive changes attributed to Ephialtes were fabrications committed in literary circles toward the middle of the fourth century.[66] It should be noted that the tradition on the measures of Ephialtes concerning the Areopagos is not merely late but also vague. One may contrast the evidence on Kleisthenes. The tradition says what Kleisthenes did and current controversy concerns his purpose. On Ephialtes the tradition does not even say what he did.

Modern attempts to reconstruct the work of Ephialtes have been of two kinds. Some scholars have attributed large and even portentous changes to him. Others have supposed that he carried a reform which, however important, was strictly limited in scope and they have tried to guess what the specific reform was.[67] The latter approach is to be preferred because of the absence of reference to Ephialtes in literature earlier than Aristotle. Had Ephialtes brought about a portentous change, one might expect to find some allusion to it in the writings of Herodotos or Pseudo-Xenophon or Aristophanes or the Attic orators. So the historian studying Ephialtes should look for a measure of limited scope, and lately historians have looked in two directions, which are not mutually exclusive. First, an old guess suggested that Ephialtes altered the procedures of *euthynai,* that is, the procedures for calling officers to account when they laid down office.[68] In the time of Aristotle (*AP.* 48.4–5; 54.2) the procedures culminated in a hearing before a *dikastērion.* It is suggested that before 462/61 final decision on retiring officers called to account was taken, not by a *dikastērion,* but by the council of the Areopagos. Against this hypothesis it can be urged that there is no good evidence that the Areopagos had ever tried *euthynai.*[69]

The other direction pursued lately in attempts to discover the work of Ephialtes concerns *dokimasia,* the scrutiny which each candidate had to pass after he had been chosen but before he took

office. For most offices the scrutiny took place in a *dikastērion* and only in a *dikastērion*.[70] But persons chosen for the coming year to the council of five hundred and to the nine archonships (except for the secretary of the *thesmothetai*) presented themselves for scrutiny to the current council of five hundred before they faced a definitive scrutiny before a *dikastērion*.[71] In the time of Aristotle an adverse vote of the council at the scrutiny was no longer decisive, for the case was then transferred to the *dikastērion*. The role of the council of five hundred in scrutinizing men chosen to that council for the coming year can be explained, if it is reasonable that an office should have a voice in reviewing its own successors. But it is difficult to see why the council of five hundred should scrutinize men chosen to the nine archonships. Men who had held the nine archonships became in consequence members of the council of the Areopagos. So one may conjecture that originally the council of the Areopagos scrutinized men chosen to the nine archonships, but later a reform was carried transferring this task to the council of five hundred. Since the substantial element in the tradition on Ephialtes is that he took powers away from the Areopagos, one may suppose that the conjectural reform was his work.

Plutarch (*Kimon* 15.3) says that Kimon tried to repeal the reform of Ephialtes concerning the council of the Areopagos. But if that council had declined in personnel since 487, the reform may not have been the main issue in contemporary controversy. The bitterness which led to the assassination of Ephialtes may have sprung from differences on foreign policy. Kimon had been tried after his return from Thasos in 463, but he had been acquitted. During 462 the Spartans appealed to Athens for help in their operations at Ithome. Ephialtes opposed the dispatch of aid, but Kimon was dispatched with a force. When the Spartans dismissed him, the Athenians took offense; they put an end to their alliance with the Spartans and allied with the Argives, who were at war with Sparta. They also ostracized Kimon. Evidently there were plentiful arguments and important decisions about foreign policy in 462. The developments may have been more complex than the scanty sources indicate. Ephialtes had led an expedition of thirty ships beyond the Chelidonian islands sometime in his career. One should resist the temptation to reconstruct his foreign policy on simple lines. But it is clear that he opposed Kimon on foreign policy, and it is possible that his measure concerning the Areopagite council sprang from this divergence.[72]

VII

Perikles, as represented by Thucydides (2.63.2), told the Athenians in 430 that they exercised leadership over their allies "as a tyranny." Moderns have expressed the same idea less vigorously by saying that the Delian League changed into an Athenian Empire. The development brought economic benefits to many Athenians. When members of allied cities were made to sail to Athens for lawsuits, petty tradesmen had opportunities for profit.[73] In 392/91 Andokides (3.9) said that the Athenians had formerly held more than two-thirds of the territory of Euboia, an exaggeration no doubt, but the remark shows what the Athenians aspired to.

Power, wealth, and growth of population brought greater articulation of institutions. Meetings of the assembly doubtless became far more frequent than in the sixth century, although laws determining the number of meetings are only known from the fourth.[74] Decrees inscribed on stone and recovered by excavation become frequent from about the middle of the fifth century onward. Many decrees may have been voted before, but relatively few had been inscribed on stone, if those discovered are a fair sample. The new habit shows not only that financial resources enabled the Athenians to undertake the expense of recording their decisions on marble. It also displays a desire to proclaim what they were doing. A similar spirit appears in some other inscriptions. In 454/53 the *hellenotamiai,* who received the tribute of the allies, adopted the curious practice of inscribing on marble the first fruits rendered to Athena at the rate of a sixtieth from each particular payment received. The custom of inscribing financial records on stone was followed by other boards handling public funds, and many of them had their accounts inscribed every year or, in some cases, every four years.

The number of offices, mostly annual, grew markedly with the increase of public and imperial business. Most of them were filled by sortition, except for those requiring special talent, such as military offices. Aristotle said that there were 700 domestic offices, apart from the council of five hundred and apart from offices exercising competence outside Attica. The context of his statement has suggested exaggeration to some readers, but his total of 700 has lately been defended.[75] Care of lawsuits and their presentation to courts were a main task of some offices; in the fourth century and perhaps before the laws were classified according to the officers charged with upholding them (page 41 above). The growth of prosperity and public business brought an increase of litigation, al-

though the stages escape conjecture. The figure of 6,000 for the number of men available as *dikastai* is first attested in the *Wasps* of Aristophanes (lines 661–62); that play was produced in 423/22. Payment for dikastic service was introduced on the motion of Perikles.[76] It is presumed that payment for the council of five hundred and for other civil offices was introduced a little later.

The developments outlined in the preceding three paragraphs enabled Athenians drawn from ever wider circles to participate in public affairs. They did not mark any change of direction in the evolution of the constitution but rather an intensification and greater articulation. The resulting conditions were criticized bitterly in some quarters, as is shown by the treatise on *The Constitution of the Athenians* preserved among the works of Xenophon. That treatise was probably composed between about 443 and 424.[77] Desires to alter the direction of constitutional development first issued in action in 411 and their realization was only temporary. The crisis was financial. Since the Athenian expeditionary force had perished in Sicily in 413 and many allies on the west coast of Asia Minor had seceded in the ensuing year, the Athenians could no longer afford public expenditure on the now-accustomed scale. The fundamental proposal of the reformers was that public payment should be restricted to those engaged in armed service.[78] Consequently, civilian offices were to be restricted to those able to serve without state-pay, and it was expected that they would number not more than 5,000. But as Thucydides (8.66.1) adds, those who carried out the change intended to keep control of the city. The reformers brought about the installation of a council of four hundred in place of the traditional council of five hundred and they made it a façade for their rule. They governed by terror and came under suspicion of treacherous negotiations with Sparta. Conflicts among the reformers led to their overthrow by the assembly and the dismissal of the council of four hundred in the fall of 411; that council had been in office rather less than four months.

The condition following the overthrow of the four hundred has been well called "the intermediate regime." Its nature is disputed. Some hold that it restricted the franchise to the notional 5,000, who were qualified by property to hold offices without state-pay (their actual number may have been nearer 9,000 than 5,000; see page 6 above). Others think that only eligibility for public office was thus restricted and all adult male citizens continued to have the right of voting in the assembly.[79] That question need not be studied here, since the present concern is with changes which had

lasting effect on the constitution. During the campaigning season of 410 the Athenian naval forces operating from the Hellespont defeated the Peloponnesians at Kyzikos and set up a customs-station at Chrysopolis in the territory of Chalkedon; tolls were to be levied on shipping coming from the Black Sea.[80] Thus a reliable source of revenue was secured. Starting in 410/9 Athenian inscribed accounts record payments made "for the *diōbelia*." The word, indicating a rate of two obols, evidently marks restoration of public pay for civilian service of some kind; probably it includes payments to *dikastai* and to the council of five hundred.[81]

The only lasting effect of the revolution of 411 was to provoke the Athenians to undertake revision of the laws (page 45 above). That task proved to take longer than was at first expected. It had not been completed when the Athenians surrendered to the Peloponnesians in the spring of 404. Some time later, under pressure from Lysander, the Athenians set up a board of Thirty; these were commissioned to revise the laws and in the meantime they were to take control of the city.[82] The revolutionaries of 404 were more bitter than those of 411; men like Kritias had returned from exile under the terms of peace and resented their sufferings. Their professions were accordingly less concerned with finance and more with propriety. Sycophants and those who flattered the demos were to be suppressed. The city was to be purified of unjust men, and the other citizens were to be converted to "virtue and justice." Athens was to be a city fit for "gentlemen" (*kaloi k' agathoi*) to live in.[83]

Many Athenians were driven into exile by the terror. Returning as freedom-fighters in the winter of 404/3, they seized the fortress at Phyle in northern Attica. They won the upper hand in the civil war, and the Spartan king Pausanias mediated peace between the two sides. Several years were to pass before those who had stayed in the city learned to have full confidence in the victors and the amnesty.[84] But the net result of the revolution of 404 was to discredit people who talked about "gentlemen" and "virtue." Such language fled from the public oratory of the fourth century and found a home in the schools of philosophers.

VIII

In 403/2 the Athenians set about revising their laws with renewed vigor. In principle, this was the largest internal change in the commonwealth since Solon had codified the laws. The Athenians

came within sight of acknowledging a new epoch when they determined the year 403/2 to be the limit of legal memory (page 37 above). Yet they shied away from recognizing the potentially revolutionary character of their action. They conceived and ordered the revision in a conservative spirit. The decree of Teisamenos said that the Athenians were to observe the *nomoi* of Solon and the *thesmoi* of Drakon; current lawgivers were to take action "where additional laws are needed" (page 35 above). In the fourth century the Athenians continued to believe that their laws were the laws of Solon and that their law on homicide was the law of Drakon.

Some innovations, launched about the beginning of the fourth century, were consequent on the civil war of 403 and the amnesty which brought it to an end. This is true of the procedure of *paragraphē,* whereby the defendant in a suit could challenge the admissibility of the plaintiff's plea and have the question of admissibility judged by a court (page 54 above). This was introduced on the proposal of Archinos in 401/0 to protect defendants against being sued in contravention of the amnesty. Later, other laws, of which only the effect is known, extended the applicability of this procedure by recognizing additional grounds for denying admissibility (cf. page 80 above). Again, soon after the overthrow of the Thirty, the number of judges with authority to determine suits worth less than ten drachmas was raised from thirty to forty and they ceased to travel through the demes. Probably in 400/399 the public arbitrators were instituted (pages 58-59 above). These innovations improved the administration of justice. Others may have been prompted by the codification of the laws. That may well have led the Athenians to institute the procedure of *nomothesia* and the *graphē nomon mē epitēdeion theinai* as a safeguard against its abuse (pages 41–44 above).

Changes concerning the council of five hundred and the assembly were made early in the fourth century. Payment for attending meetings of the assembly was introduced at a rate of one obol and raised soon to two obols and then to three. The rate of three obols was probably reached before 391. When Aristotle composed *The Constitution of the Athenians,* the rate was nine obols at the *kyria* meeting of each prytany and six obols at the others.[85] The number of meetings of the assembly came to be prescribed at an unknown date. By 353/52 each prytany was required to call three meetings of the assembly, and later the number was raised to four. Likewise, standard items for the agenda were prescribed for the different meetings.[86] The practice was adopted of choosing nine councillors

from the *phylai* which were not providing the current *prytaneis* to preside as *proedroi* at meetings of the council and the assembly (page 42 above).

In 378/77 the Athenians, now committed to prosecuting war against Sparta with vigor, carried out a fiscal change of major importance. It concerned the *eisphora,* the tax on property levied for military purposes. The tax had been levied at least as early as 428, but in 378/77 it was reorganized. The property of each citizen was assessed and the total was found to be 5,750 talents. Henceforth, whenever the assembly voted a levy, it decided what proportion of their property the citizens should contribute. To facilitate collection the taxpayers were divided into 100 symmories or fiscal groupings. Probably at the same time the liturgy called the *proeisphora* was introduced. That is, when a levy was voted, the three richest men of each symmory were required to pay in advance the sum due from their symmory and then they could recoup themselves from the other members of their symmory.[87] The system proved to be effective both in providing funds for warfare and later in deterring the assembly from engaging in lighthearted ventures. It reflected fundamental and abiding convictions held by the Athenians. The standard citizen (page 30) owned property and his ownership had to be respected. Only a danger as serious as warfare justified requiring him to part with a proportion of his property, and then the loss was to be distributed evenly.

Changes in court procedure were instituted a little after 380, although neither the precise date nor the reason can be determined.[88] Henceforth the pleas of the parties in a *dikē,* that is, the complaint of the plaintiff and the response of the defendant, were to be submitted not orally but in writing. Henceforth, too, the depositions of witnesses were taken down in writing at the preliminary hearing before the magistrate and produced in written form at the trial, but the witnesses still had to attend the trial in case a litigant might wish to charge them with false testimony. Perhaps these changes of procedure should be associated with the adoption of the final method for assigning *dikastai* to courts (page 59 above).

Between 368/67 and 363/62 a change was made in the mode of choosing the secretary of the council. Previously he was a member of the council, chosen by election to serve for one prytany from among the *phylai* which were not supplying the current *prytaneis.* Under the new practice the secretary was chosen by sortition from among all the citizens to serve for the whole year.[89] Election, as opposed to sortition, expressed the confidence of the electors. Aris-

totle says that under the older system the men chosen as secretary were "the most esteemed and trustworthy." Correspondingly, secretaries had sometimes had their names engraved in prominent lettering above decrees. It is not clear that the change made any difference to the functions of the office, yet it was significant among people as sensitive to prestige as the Athenians. The student of Athenian inscribed decrees notices that they grow longer and more wordy during the fourth century. In the opening formula it becomes customary to state the date by the day of the prytany and later by the day of the month, too.

Only a little can be said about important changes in procedural law. No case of *eisangelia* is known to have been determined finally in the assembly after 362. Probably laws were passed a little later to ensure the accused a hearing in a *dikastērion* (page 89 above). Toward 340 the procedure of *apophasis* was developed, whereby an investigation by the council of the Areopagos could lead to trial before a *dikastērion* (pages 56–57 above). Political passions were apparent in the few cases known under this procedure. One wonders whether the procedure was devised for political motives or even in consequence of political intrigue. Alternatively it may have been intended to ensure fair trial in spite of political influences.

During the fourth century financial offices acquired new prominence in the management of Athenian affairs. The theoric fund and the board taking charge of it were probably instituted on the proposal of Euboulos. Reelection to the board may have been allowed. A contemporary source says that, because of the confidence which the Athenians had in Euboulos, the theoric board undertook many tasks going far beyond theoric distributions. The need for financial reform was evident from the impoverished state of the city immediately after the Social War. This was Euboulos's opportunity, and he remained highly influential until about 339.[90] Shortly afterward, Lykourgos made himself felt in finance; a laudatory decree said later that he had been in actual control for twelve years, although he may have held formal office only for the first four years.[91] Some specialization developed also in the board of *stratēgoi*. One of them was directed at the elections to take command of the hoplites, another was charged with defense of the territory, two took command of the Peiraieus, and one supervised the trierarchic symmories.[92]

The brief survey given above of constitutional developments from 403 until 322 shows that many changes of very varied kinds were

made. Some of them, for example, that concerning choice of the secretary of the council, may have had no effect on the exercise of power. But others, notably those in court procedure and in finance, had material consequences. They cannot be dismissed as mere details. They have attracted less controversy among historians than has the constitutional history of the seventh, sixth, and fifth centuries because there is no reason to think that the changes of the fourth century were discussed by the Athenians in terms of *dēmokratia, oligarchia,* or any theoretical notions about forms of government. The innovations of the fourth century reveal down-to-earth concerns, notably for fairness in the courts and for efficiency in finance.

Before supposing that a change of mood had come over the Athenians since the fifth century, one should note a contrast in the sources. Much of the information about constitutional changes of the fourth century comes from contemporary sources, including the orators, the descriptive part of the Aristotelian *Constitution of the Athenians,* and inscriptions. The information is reliable and relatively plentiful. For information on constitutional changes before 403 one has to depend largely on secondary sources, that is, on works by writers who did not witness the events reported. Herodotos is a secondary source for the activities of Kleisthenes. The narrative part of the Aristotelian *Constitution of the Athenians* was composed by a man who had not even been born at the time of the latest event recorded. On the revolution of 411 the account given by Thucydides, however worthy of respect, is a secondary source, since the author was not present in Athens at the time. Rather than supposing that the opening of the fourth century diverted the Athenians from theoretical argument about forms of government to more mundane concerns, one should try to understand their earlier development in the light of the fourth-century concerns reflected in contemporary literature. That is, one should expect to find in constitutional development before 403 an abiding concern for fairness and efficiency. The earlier sections of this chapter do not impede that expectation.

IX

This chapter has attempted a sketch of Athenian constitutional development, starting from the earliest times. That is, it started by trying to discern, however dimly, the diffuse conditions obtaining

before the city came into being. Predominant attention has been given to the early and formative stages. It has been found that the process which brought citizenship and an organized community of citizens into being was protracted. That process was advanced markedly by the work of Kleisthenes. The concept of citizenship may well be held to have crystallized in the legislation of 451/50. The armed might of the Athenians increased a great deal when Kleisthenes enabled the state to draw fully on the military potential of the inhabitants. Consequently, during most of the fifth century the Athenians were preoccupied, not with discussing forms of government, but with exercising and extending their power abroad, and when constitutional questions were raised in 411 and 404, the crises were precipitated by reverses in warfare. The growth of Athenian power and prosperity in the period of the Delian League brought greater articulation of institutions. For example, more offices were created, the assembly met more frequently and had some of its decrees inscribed, and the introduction of payment for *dikastai* made more plentiful sessions of the courts possible. Such changes did not alter the direction in which the Athenian state was developing but adapted its institutions to new opportunities.

Regarded *sub specie aeternitatis,* the most extensive change carried out in the course of constitutional development at Athens was the codification of the law at the end of the fifth century. Yet, as has been emphasized, that codification was conceived and carried out in a conservative spirit. Moreover, although the impetus to complete the codification came from the restoration following the overthrow of the Thirty, and although the thing to be restored was called *dēmokratia,* the laws embodied in the code, so far as known, were not informed by theoretical discussion of forms of government but by the need to make the sacred and profane institutions of the Athenians work. For constitutional development in the fourth century the evidence is more precise, and it shows that further articulation and adaptation of institutions to changing conditions continued. The law as it affected the standard citizen most—the law, for example, on marriage and recognition of children, on coming of age and enrollment in the phratry and the deme, on succession to property and citizenship, and on fiscal and military obligations—was not the product of any concept of democracy but sprang from the slow development of practices and habits since the earliest times. Among the lasting practices of the Athenians singular value attaches to the ways they devised for settling disputes. Even though there may have been occasional miscarriages of justice, the

Athenians created a judiciary independent of the organs which made policy.

Appendix to Chapter 6: *Axones* and *Kyrbeis*

Classical and Hellenistic sources, to be noticed below, say that the laws of Solon and Drakon were written on objects called *axones* and *kyrbeis*. If these objects were well preserved in legible form into the time of the Atthidographers and of Aristotle, the literary tradition on early Athens and especially on Solon will deserve a high degree of respect. So it is important to inquire into the nature and preservation of the objects.

Aristotle (*AP.* 7.1) says that in the course of Solon's legislation the Athenians wrote his laws down on "the *kyrbeis* and set them up in the *stoa basileios*." Aristotle wrote a work, now lost, called *Concerning the* Axones *of Solon,* in five books (*Solonos Nomoi* T 1 = item 140 in the list of works in the *Vita Menagiana* of Aristotle; cf. P. Moraux, *Les listes anciennes des ouvrages d'Aristote* [Louvain, 1951], 195, 273–78). The inscription of 409/8, reproducing "the law of Drakon on homicide," prefaces the heading "first *axon*" to the text (IG. I^3, 104 = Meiggs/Lewis No. 86, line 10), and a good deal lower (line 56) it gives the heading "second *axon*." Evidently the recorders of 409/8 took the text from numbered objects called *axones*. The comic poet Kratinos, active about 450 to 419, mentioned the *kyrbeis* of Solon and Drakon and said that his contemporaries were in the habit of roasting barley on them (Plut. *Sol.* 25.1 = *SN.* T 13). Some have concluded that the *kyrbeis* were of wood, which could be burned, but others have supposed that they were of bronze and could serve as pans for roasting barley. In this dilemma Pittakos comes to the rescue with a witty remark: "asked . . . by Kroisos which authority is the greatest, 'that of the painted timber', he replied, meaning the law" (Diog. L. 1.77).

Evidently wood was the accepted material for publishing laws in the first half of the sixth century. If the laws of Solon and Drakon were painted on wood, that does not exclude the possibility that they were later inscribed anew on bronze or stone. But by the time

that was done the writings on wood may have become difficult to read. Indeed that is the most readily conjectured reason for inscribing them anew. The Athenians could be scrupulously pious in inscribing documents afresh (as shown by D. M. Lewis, "A note on *IG* i^2 114," *JHS*. 87 [1967]: 132). It does not necessarily follow that the Athenians were always so careful or that the texts from which they copied were always legible.

From testimonia noted in the preceding paragraph four conclusions follow:

1. the laws of Drakon were inscribed on objects called *kyrbeis,*
2. the laws of Drakon were inscribed on objects called *axones,*
3. the laws of Solon were inscribed on objects called *kyrbeis,* and
4. the laws of Solon were inscribed on objects called *axones.*

One would like to know how these objects were related to one another and how well they were preserved. Plutarch (*Sol.* 25.1) says that only small fragments of the *axones* remained in the Prytaneion in his own time. It is more to the point that two Hellenistic scholars disagreed about the shape of the objects. Eratosthenes (Etym. Gud. s.v. *kyrbeis* = SN. T 2) said that the *kyrbeis* were triangular. Polemon, contradicting him (Harpok. s.v. *axoni* = SN. T 14), said that the *axones* were rectangular, but in some positions they looked triangular. One should not try to reconcile this conflict of testimony. Instead one should recognize that by the third century the objects were so poorly preserved that their shape was open to dispute. Consequently, one should take seriously the remark of Kratinos about the disrespectful way in which the *kyrbeis* were treated in his time, and one may doubt the hypothesis that the texts were transferred from wood to bronze for better preservation.

A great deal of thought has been devoted to the *axones* and the *kyrbeis* and some conclusions have been established. Two at least deserve note.

1. In the learned literature of the Hellenistic and Roman periods a better and an inferior tradition on the laws of Solon can be discerned. The inferior tradition probably derives from Hermippos; its ultimate sources include orators and comic poets. The better tradition derives from the five books of Aristotle entitled *Concerning the* Axones *of Solon* (thus E. Ruschenbusch, *Solonos Nomoi,* 39–58). How well the texts were preserved into the time of Aristotle is another question.

2. Plutarch (*Sol.* 24.1-2 = Solon F 65) says that a law about export of agricultural produce stood on the first *axon* of Solon. Since the headings "first *axon*" and "second *axon*" have been read in the inscription of 409/8, it appears that the first *axon* of Drakon was devoted to provisions about homicide. So it is likely that the *axones* of Solon were different objects from the *axones* of Drakon (thus Stroud, *Drakon's Law,* 32). This conclusion is not inevitable; the figure "first" in Plutarch's remark about the law on exports may be corrupt. Indeed several laws attributed to Solon (F 3, 4, 5cd, 7, 11, 12) seem to be provisions on homicide (cf. E. Ruschenbusch, *Gnomon* 46 [1974]: 817).

Concerning the relationship between *axones* and *kyrbeis,* the following three theories have been propounded within the past thirty years.

1. The *kyrbeis* bore sacred law and the *axones* bore secular law. This view, asserted after a fashion in antiquity by Aristophanes of Byzantion (Etym. Gud. s.v. *kyrbeis* = SN. T 2), has been defended by S. Dow ("The law codes of Athens," *Proceedings of the Massachusetts Historical Society* 71 [1953–57; published 1959], 3–36, at 27–35). It has been rejected by Ruschenbusch (*Solonos Nomoi,* 18) and A. Andrewes ("The survival of Solon's *axones,*" in D. W. Bradeen and M. F. McGregor, eds., *Phoros: Tribute to B. D. Meritt,* [Locust Valley, N.Y., 1974], 21–28, at 22). Many of the preserved quotations from the *kyrbeis* and the *axones* conform to Dow's distinction; the counter-examples can be explained away.

2. Laws were inscribed on the surfaces of *axones.* The word *kyrbeis* includes the frameworks in which the *axones* were pivoted. This view has been propounded by Ruschenbusch (*Solonos Nomoi,* 20–24; cf. Rhodes, *Comm.,* 131–33).

3. Drakon published his laws on wooden *axones* and Solon published his on wooden *axones.* Later, before 461 and probably before 480, those of Drakon's laws that were still in force and all the laws of Solon were copied onto bronze *kyrbeis.* Thus the *axones* and the *kyrbeis* were two copies of the same laws. This is the view of R. S. Stroud (*The axones and kyrbeis of Drakon and Solon* = University of California Publications in Classical Studies, vol. 19 [1979], 12–17, 41–44; cf. idem, "State documents in archaic Athens," in *Athens Comes of Age: From Solon to Salamis* [Princeton, 1978], 20–42, at 23–27).

These three theories are mutually incompatible. Each of them has been defended with erudition, ingenuity, and eloquence, so that this reader at least has found each in turn highly plausible. The proper conclusion is that no one knows what the relation was between the *axones* and the *kyrbeis*. The most that can be said with confidence is that *axones,* in view of the etymological connections of the word, were pivoted so that they could be made to revolve and to expose different surfaces to the viewer.

Assertions of Aristotle and of Anaximenes call for note, because they have played a large part in the most recent study of the problem (Stroud, 1979). Aristotle (*AP.* 7.1) says that in consequence of Solon's work the Athenians wrote the laws down on the *kyrbeis* and set them up in the *stoa basileios*. Excavators, however, have found that the *stoa basileios* was first built in the middle years of the sixth century (T. L. Shear, Jr., "The Athenian Agora: Excavations of 1970," *Hesperia* 40 [1971]: 241–79, at 249–50). The information offered by Anaximenes (*F. Gr. Hist.* II A 72 F 13) was cited by Didymos to explain the words "the law from below" at Demosthenes 23.28:

> [Didymos] says that Ephialtes removed the *axones* and the *kyrbeis* from above from the akropolis to the Bouleuterion and the agora, as Anaximenes says in the *Philippika*.

A remark of Pollux (8.128) appears to draw on the same passage of Anaximenes:

> In early times the *kyrbeis* and the *axones* stood on the akropolis. Later they were moved to the Prytaneion and the agora, so that everyone could consult them. That is why they spoke of "the law from below" in contrast with the akropolis.

Pollux named the Prytaneion, whereas Didymos spoke of the Bouleuterion. One cannot be sure which Anaximenes wrote.

In the light of this evidence the most recent reconstruction maintains that the *axones* and the *kyrbeis* stood on the akropolis until about 461. Then Ephialtes moved the *axones* to the Prytaneion and the *kyrbeis* to the agora, probably to the *stoa basileios*. The officers at work on revising the laws from 410 until 399 drew on the *kyr-*

beis for part of the new calendar of sacrifices (cf. Lys. 30.17–20), which they inscribed on the walls within the *stoa basileios*. So some of the *kyrbeis* were kept in the *stoa basileios* during their period of activity and perhaps afterward into Aristotle's time. It is claimed:

> Just as Aristotle inferred from its archaic appearance and obvious antiquity that the Royal Stoa was as old as Solon, so likewise he may have inferred from the observed presence of some of the kyrbeis in the same building that the Athenians set them up there at the time of Solon's nomothesia. This interpretation has the advantage of reconciling the alleged contradiction between the evidence of Anaximenes and the AP without doing violence to either. (Stroud, 1979, 15–16)

Since Aristotle (*AP*. 7.1) says that the Athenians set the *kyrbeis* up in the *stoa basileios* in the time of Solon, any reconstruction which says that the Athenians did not set the *kyrbeis* up in the *stoa basileios* in the time of Solon does violence to Aristotle's statement. Violence must be done to Aristotle's statement if the *stoa basileios* did not exist in the time of Solon. It is easy to discern the reason for his error. In his own time laws, codified in 403–399, were on display on freestanding walls in the *stoa basileios*. From this observed fact Aristotle inferred that the *kyrbeis* of Solon had been set up in the *stoa basileios* in Solon's time. His statement to this effect has no more value than his attribution to Solon of standardization of weights and measures (*AP*. 10; see M. H. Crawford, "Solon's alleged reform of weights and measures," *Eirene* 10 [1972]: 5–8; M. Chambers, "Aristotle on Solon's reform of coinage and weights," *CSCA*. 6 [1973]: 1–16).

It is more difficult to assess the value of the fragment of Anaximenes. Only a dozen fragments of his *Histories concerning Philip* are preserved. The longest of them is speech 11 in the Demosthenic corpus. Only one of the fragments, the one about Ephialtes, deals with events before the time of Philip II. It is not clear why Anaximenes digressed to talk about Ephialtes or whether he took care to get good information on that Athenian statesman. The tradition on Ephialtes as transmitted to the fourth century was scanty (see E. Ruschenbusch, "Ephialtes," *Historia* 15 [1966]: 369–76). The alleged removal of the *axones* and the *kyrbeis* from the akropolis cannot be brought into relation to the known activities of Ephi-

altes, although not much of them is known. Some readers have reached a low estimate of the talents of Anaximenes ("capable of a rather unusual silliness," G. T. Griffith, in Hammond and Griffith, *A History of Macedonia,* vol. 2 [Oxford, 1979], 707). The proper conclusion is that one cannot tell whether his statement about Ephialtes is true or false.

The trend of recent scholarship (notably Andrewes, page 142 above, and Stroud, page 142 above) has been in favor of supposing that the *axones* and *kyrbeis* survived, legible and unchanged, into a highly literate period, so that putative information about them deserves credence. This Appendix has shown that there are too many unknowns and uncertainties for such a view to be recommended. A consideration of method should be borne in mind. In historical reconstruction a credulous attitude toward evidence may build a beautiful structure, but if one wishes one's house to stand up to time and criticism, it is prudent to build only on foundations which are secure. Simple faith may be the proper spirit in which to approach the Holy Scriptures, but humane letters are not inspired.

7
Athens and the Rule of Law

Indem die Griechen das Politische entwickelten, bildeten sie das Nadelöhr, durch das die Weltgeschichte hindurch musste, wenn sie zum modernen Europa gelangen sollte.
—C. Meier, *Die Entstehung des Politischen bei den Griechen* (Frankfurt-am-Main, 1980), 13

If a slogan is needed, Athens was a republic, not a democracy. But slogans lend themselves to distortion. The negative argument of the foregoing chapters has been that calling Athens democracy or *dēmokratia* says nothing. Both the ancient and the modern word are treacherous.

The positive thesis is that the Athenians strove through the centuries to achieve the rule of law. The term, though not wholly precise, is serviceable. It approximates in meaning to *isonomia* (page 99 above), a word which may have been coined to express the ideal pursued when the tyrants were overthrown in archaic Athens. The notion of the rule of law gains in resonance if one notices the institutions through which the Athenians tried to achieve it. One of these was codification. It has been argued above (pages 115–16) that the first comprehensive code for the Athenians was that of Solon, even though some isolated measures may have been put in writing before. A new codification was carried out at the end of the fifth century, and the revised laws were inscribed on walls in the *stoa basileios* "so that anyone who wishes may inspect them," as the decree of Teisamenos provided (page 37 above). The notion of law as a science requiring professional study never occurred to the Athenians. Consequently, they were not strong on legal memory, but they were not afflicted with an order of experts bent on enlarging its own privileges. Once their code had been

revised, they achieved a high degree of sophistication in preserving it. Although they insisted that the laws were not the creation of a still available authority but something given in the past, they instituted a procedure of amendment, and they developed judicial procedures to protect the code both against decrees of the assembly and against ill-considered use of the procedure of amendment.

The other institution through which the Athenians realized the rule of law was the separation of the judiciary power from other organs. The first step was taken at an early date, which cannot be ascertained, when the *ephetai* were created to try charges of homicide. The issue was to be joined on the question, whether the act of homicide was voluntary or involuntary. Later the *hēliaia* was brought into being, probably on the model of the *ephetai*. It was a numerous body of citizens, aged at least thirty and bound by oath. It may have come into being even before the time of Solon, but his codification surely extended its scope. As judicial business grew in the classical period, the multiple *dikastēria* replaced the single *hēliaia*. Continuity was advertised in the preserved terms "*hēliaia*," "*hēliastes*," and "heliastic oath" (page 60 above). Throughout the development the Athenian judiciary was independent of other organs; that is, it was independent of political organs.[1]

As far as can be seen, the Athenian judiciary arose in the beginning, not from the will of any powerful kings, but from among those who have here been called standard citizens. A development of a more authoritarian kind might have been possible; as noted above (page 82), Hesiod indicates that kings or lords were the source of justice in Boiotia. In recent centuries the rule of law owes its recognition and development in large part to monarchs, who instituted courts. Five hundred years ago every city in Europe had a wall to protect it against the arbitrary depredations of such men as Wenzel von Tronka, whom Kleist immortalized in *Michael Kohlhaas*. Consolidating their realms, kings and princes appointed judges and founded universities to train them. The law available for study was mostly Roman law, elaborated in the commentaries which Justinian had forbidden. Therefore, much of the process, whereby modern man acquired gentle and regular ways of dealing with his neighbor, is properly called "the reception of Roman law."[2] Had the Romans themselves at an early stage learned the need for courts, for written laws, and for evenhanded administration of justice from Greek models? The possibility can neither be dismissed nor confirmed. It is more to the point to note that by the nineteenth and early twentieth centuries the principles of the rule of

law were generally recognized in European monarchies. This is true even of the more authoritarian monarchs, such as the Romanovs. For example, in 1904 the prohibition of Lithuanian books in the Latin alphabet, a prohibition which had been upheld by administrative fiat for forty years in the governments of Vilnius and its neighborhood, was rescinded because it was found by the Senate in St. Petersburg to have no legal ground.[3]

The *Institutes* (1.2.1–2) of Justinian explain that the positive law of any community is called its *ius civile,* and since the work is intended for Roman citizens, the *ius civile* to be studied is Roman law. Civil society is society ordered by civil law. The term "the civil law" has often been employed more narrowly to mean Roman law, but it does not in context lead to ambiguity. From 1835 until 1841 a young man studied law and other subjects at the universities of Bonn, Berlin, and Jena. When he later developed a historicist theory, he exploited an ambiguity of his own willful devising. In the thought of Karl Marx and his followers "civil society" has been altered to "bourgeois society." The patient work of centuries to bring about the rule of law has been dismissed as merely achieving the interests of a class, and arbitrary rule is justified in the name of the proletariat.

Theories of class struggle, however defined, have exercised a peculiar fascination over historians. They enable the historian to be an idealist and a materialist at once. He is an idealist because he is on the side of the underdog, but he is a materialist because he recognizes the economic motive as paramount. It is unfortunate that some historians have reduced the political and constitutional history of Athens to a struggle between supposed classes championed respectively by democrats and oligarchs. The aim of this book has been to show, not merely that the Athenians took steps to achieve the rule of law, but also that their achievement is worth study. For attention given nowadays to ancient Athens may or may not contribute to a better understanding of antiquity, but it certainly contributes, for better or worse and in lesser or greater degree, to modern thought. Those who reduce the history of Athens to a class struggle overlook the abiding significance of the Athenian concept of justice.

Notes

Abbreviations

The abbreviations employed for the names and works of ancient authors are customary or easy to recognize. Thus by "Andok." I mean Andokides, by "Ant." Antiphon, and by "Isai." Isaios. I use "*AP.*" for the Aristotelian *Athenaion Politeia* or *Constitution of the Athenians.* I call Aristotle "Ar." but Aristophanes "Aristoph.," Aischylos "Aisch." but Aischines "Aischin."

Works extant only in fragmentary form are cited from standard collections, including the following:

H. Diels and W. Kranz, *Die Fragmente der Vorsokratiker,* 3 vols. (Berlin, 7th ed., 1954)

F. Jacoby, *Die Fragmente der griechischen Historiker,* I–II (Berlin, 1923–26), III (Leiden, 1940–58), cited as "*F. Gr. Hist.*"

A. Nauck, *Aristophanis Byzantii Alexandrini fragmenta* (Halle, 1848)

S. Riccobono, *Fontes iuris Romani antejustiniani* (Florence, 1941)

E. Ruschenbusch, Solonos Nomoi: *Die Fragmente des solonischen Gesetzeswerkes mit einer Text- und Überlieferungsgeschichte* (Historia Einzelschriften 9, 1966), cited as "*Solonos Nomoi*" or "*SN.*"

M. L. West, *Iambi et elegi Graeci,* 2 vols. (Oxford, 1971–72)

The abbreviations employed for titles of journals mostly conform to *L'Année Philologique.* Others will be easy to recognize, for example, "*CA.*" = *Classical Antiquity,* "*C et M.*" = *Classica et Mediaevalia,* "*SO.*" = *Symbolae Osloenses.* By "*ZSS.*" I mean the Romanistische Abteilung of the *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte.*

The following abbreviations are used for modern works.

Beloch, *Gr. Gesch.* = K. J. Beloch, *Griechische Geschichte,* 4 vols. in 8 (Strassburg, Berlin, and Leipzig, 2d ed., 1912–27)

Blass, *Att. Bered.* = F. W. Blass, *Die attische Beredsamkeit,* 3 vols. (Leipzig, 1887–93)

Bonner and Smith = R. J. Bonner and G. Smith, *The Administration of Justice from Homer to Aristotle,* 2 vols. (Chicago, 1930–38)

Cohen, *Theft* = D. Cohen, *Theft in Athenian Law* (Münchener Beiträge zur Papyrusforschung und antiken Rechtsgeschichte 74, 1983)

Davies, *APF.* = J. K. Davies, *Athenian Propertied Families* (Oxford, 1971)

Day and Chambers, *Aristotle's History* = J. Day and M. Chambers, *Aristotle's History of Athenian Democracy* (University of California Publications in History 73, 1962)

Hansen: M. H. Hansen's six volumes under the general title *Det athenske demokrati i 4. arhundrede f. Kr.* (Opuscula graecolatina 15, Copenhagen), are referred to by the titles of the single volumes:

1. *Staten, folket, forfatningen* (1978)
2. *Folkeforsamlingen* (1977)
3. *Nomotheterne* (1977)
4. *Folkedomstolen* (1979)
5. *Embedsmaendene* (1979)
6. *Politikerne og guldalderdemokratiet* (1981)

Hansen, *Apagoge* = M. H. Hansen, Apagoge, Endeixis *and* Ephegesis *against* Kakourgoi, Atimoi *and* Pheugontes: *A study in the Athenian Administration of Justice in the Fourth Century* B.C. (Odense University Classical Studies 8, 1976)

Hansen, *Eisangelia* = M. H. Hansen, Eisangelia: *The Sovereignty of the People's Court in Athens in the Fourth Century* B.C. *and the Impeachment of Generals and Politicians* (Odense University Classical Studies 6, 1975)

Hansen, *Sovereignty* = M. H. Hansen, *The Sovereignty of the People's Court in Athens in the Fourth Century* B.C. *and the Public Action against Unconstitutional Proposals* (Odense University Classical Studies 4, 1974)

Hansen, *Volksversammlung* = M. H. Hansen, *Die athenische Volks-Versammlung im Zeitalter des Demosthenes* (Xenia 13, Constance, 1984)

Harrison, *Law* 1 = A. R. W. Harrison, *The Law of Athens: The Family and Property* (Oxford, 1968)

Harrison, *Law* 2 = A. R. W. Harrison, *The Law of Athens: Procedure* (Oxford, 1971)

Hignett, *HAC.* = C. Hignett, *A History of the Athenian Constitution* (Oxford, 1952)

Lipsius, *AR.* = J. H. Lipsius, *Das attische Recht und Rechtsverfahren,* 3 vols. (Leipzig, 1905–15)

MacDowell, *Law* = D. M. MacDowell, *The Law in Classical Athens* (London and Ithaca, N.Y., 1978)

Meiggs/Lewis = R. Meiggs and D. Lewis, *A Selection of Greek Historical Inscriptions to the End of the Fifth Century* B.C. (Oxford, 1969)

Rhodes, *Comm.* = P. J. Rhodes, *A Commentary on the Aristotelian* Athenaion Politeia (Oxford, 1981)

Rhodes, *Boule* = P. J. Rhodes, *The Athenian Boule* (Oxford, 1972)

Ruschenbusch, *Athenische Innenpolitik* = E. Ruschenbusch, *Athenische Innenpolitik im 5. Jahrhundert v. Chr.* (Bamberg, 1979)

Sealey, *Essays* = R. Sealey, *Essays in Greek Politics* (New York, 1967)

Sealey, *History* = R. Sealey, *A History of the Greek City States ca. 700–338* B.C. (California, 1976)

Stroud, *Drakon's Law* = R. S. Stroud, *Drakon's Law on Homicide* (University of California Publications in Classical Studies 3, 1968)

Tod II = M. N. Tod, *A Selection of Greek Historical Inscriptions, volume II: From 403 to 323* B.C. (Oxford, 1948)

Wade-Gery, *Essays* = H. T. Wade-Gery, *Essays in Greek History* (Blackwell, Oxford, 1958)

Wolff, *Normenkontrolle* = H. J. Wolff, *"Normenkontrolle" und Gesetzesbegriff in der athenischen Demokratie* (Sitzungsberichte der Heidelberger Akademie der Wissenschaften, philologisch-historische Klasse, 1970)

Chapter 1

1. The *metabolai* are listed at *AP.* 41. The influence of Aristotle's classificatory approach on his understanding of Athenian development has been studied by Day and Chambers, *Aristotle's History.* For reflections on the question of authorship, see ibid., 2–4, and Rhodes, *Comm.,* 61–63. Four forms of democracy are distinguished by Ar. *Pol.* 4.1292b25–1293a10 and 6.1318b6–1319b32. Five are distinguished at 4.1291b30–1292a6, but see Day and Chambers, 55 n. 94.

2. Cf. Wolff, *Normenkontrolle,* 80.

3. For example, H. J. Wolff, *Roman Law: An Historical Introduction* (Oklahoma, 1951), 63: "The Romans, like the English, retained a remarkable spirit of traditionalism."

4. I am much indebted to the Roman chapters (pp. 251–810) of J. Gaudemet, *Institutions de l'Antiquité* (Paris, 1967). See Gaudemet, p. 395, on the fruitful significance of the procedural sanction in Roman law.

Chapter 2

1. Diod. 18.18.4–5. The manuscripts of Diodoros give 22,000 as the number of those disfranchised, but Plutarch (*Phok.* 28.4), recording the same event, gives 12,000. The report of Ktesikles on the census taken by Demetrios of Phaleron suggests that the lower figure is right. A total of about 20,000 citizens in the middle and later part of the fourth century is suggested by Plat. *Kritias* 112d, [Dem.] 25.50–51, [Plut.] *Ten Orators* 843d–e. The higher figure for 322 is defended by P. J. Rhodes, "Ephebi, Bouleutae and the population of Athens," *ZPE.* 38 (1980): 191–202. E. Ruschenbusch has discussed the population of Athens in a series of articles appearing in *ZPE.* since 1979; they conclude with "Zum letzten Mal: die Bürgerzahl Athens im 4. Jh. v. Chr.," *ZPE.* 54 (1984): 253–69. Among older discussions, that by K. J. Beloch in *Die Bevölkerung der griechisch-römischen Welt* (Leipzig, 1886), 57–60, is the most useful.

2. Thuc. 8.65.3; 8.97.1.

3. [Lys.] 20.13.

4. Cf. Ruschenbusch, *Athenische Innenpolitik* 133–52, esp. 149.

5. Harpok. s.v. *metoikion*; Poll. 3.55.

6. D. Whitehead, *The Ideology of the Athenian Metic* (=Cambridge Philological Society, Supplementary Volume 4 [1977]), 7–10. Whitehead argues from IG. II^2, 141 = Tod 139, lines 30–36 (granting exemption from the *metoikion* to Sidonian merchants who reside in Sidon and sojourn in Athens), in support of Aristoph. Byz. fr. 38 Nauck (a specific number of days) against Harpok. s.v. *metoikion* (an intention of permanent residence).

7. On Kephalos: Lys. 12.4–8; Plat. *Rep.* 329e–331b; cf. K. J. Dover, *Lysias and the Corpus Lysiacum* (California, 1968), 29. The affairs of Pasion are known from Isok. 17, Dem. 36 and 45, [Dem.] 46, 49, 52, and 53; cf. Davies, *APF.*, 427–31.

8. Harpok. s.v. *metoikion*; cf. Hesych. s.v. *isotelēs*; Whitehead (note 6 above), 16–17. At 114–16 Whitehead argues, mainly from [Xen.] 1.10, that freedmen were regarded primarily as freedmen, not as metics, but he recognizes that one cannot tell what proportion of metics were freedmen.

9. Isai. 6.19–21.

10. That it was so considered is the main thesis of Whitehead (note 6 above); see esp. 69–108.

11. This method was followed by Beloch (note 1 above, 84–99) and A. H. M. Jones (*Athenian Democracy* [Oxford, 1957], 76–79). Beloch suggested c. 75,000 for the total of slaves; Jones suggested c. 20,000.

12. M. I. Finley (*The Ancient Economy* [California, 1973], 24) dismisses the figure as "no more than a guess." W. L. Westermann ("Athenaeus and the slaves of Athens," *HSCP.*, Supplementary Volume 1 [1940], 451–70) attached more weight to the figure given by Thucydides than to those of Hypereides and Ktesikles; he concluded that slaves were not more than a third or a quarter of the total population.

13. E. Wood, "Agricultural slavery in classical Athens," *AJAH.* 8 (1983). The

more noteworthy presentation of the view which Wood challenges is M. H. Jameson, "Agriculture and slavery in classical Athens," *CJ.* 73 (1977–78): 122–45. On the scattered holdings of rich men, see J. K. Davies, *Wealth and the Power of Wealth in Classical Athens* (Salem, N.H., 1981), 53–54.

14. [Dem.] 46.18; this law specifies which relatives could give a woman in marriage.

15. Athenian thought on homicide was somewhat preoccupied with cases where a woman gives her husband a fatal draught but believes that it is a love-philter: Soph. *Trach.* 727–28; Ar. *Mag. Mor.* 1.1188b31–37. Since women could be tried for homicide and could claim property, it is mistaken to say, as some have done (for example, Eva C. Keuls, *The Reign of the Phallus* [New York, 1985], 6), that their condition was similar to that of slaves. I hope to develop elsewhere the hypothesis that the disabilities of women sprang from the fact that they did not bear arms; hence they could not engage in self-help or consequently in litigation.

16. [Dem.] 59.66; cf. Dem. 23.53. The procedure was complex because of its historical development. It has been elucidated by E. Ruschenbusch, "Der Ursprung des gerichtlichen Rechtsstreits bei den Griechen," *Symposion 1977* (Cologne and Vienna, 1982), 1–8, at 5–7.

17. [Dem.] 59.87. The aggrieved husband was required to divorce his wife under pain of *atimia.* As the provision of this penalty suggests, the requirement of divorce was designed to prevent a man from prostituting a woman and blackmailing the customer by calling her his wife.

18. Ar. *Pol.* 1.1260a9–14. Cf. Gaius 1.144 = The Twelve Tables V, 1 (Riccobono): "Veteres enim voluerunt feminas, etiamsi perfectae aetatis sint, propter animi levitatem in tutela esse."

19. [Hdt.] 6.122.2.

20. This observation of R. Merkelbach is reported by S. B. Pomeroy, "Infanticide in Hellenistic Greece," in A. Cameron and A. Kuhrt, eds., *Images of Women in Antiquity* (London and Canberra, 1983), 207–22, at 212 with n. 6.

21. The theory stated here is based on two studies by A. Andrewes, "Phratries in Homer," *Hermes* 89 (1961): 129–40, and "Philochoros on Phratries," *JHS.* 81 (1961): 1–15. The inscription giving the regulations of the Dekeleieis is IG. II^2, 1237. Andrewes draws on the study of that inscription by H. T. Wade-Gery, "Studies in the structure of Attic society: I. Demotionidae," *CQ.* 25 (1931): 129–43 = *Essays,* 116–34. The alternative view was defended by Hignett, *HAC.,* 55–57, 313–15, and 390–91. Two recent studies call for note: D. Roussel, *Tribu et Cité* (Paris, 1976), and F. Bourriot, *Recherches sur la nature du génos: étude d' histoire sociale athénienne—périodes archaïque et classique* (Lille, 1976); cf. N. R. E. Fisher, *JHS.* 99 (1979):193–95 (review of Bourriot), and R. C. Smith, "The clans of Athens and the historiography of the archaic period," *EMC.* NS. 4 (1985): 51–61. The trend of these works has been away from the rigid patterns which nineteenth-century scholars professed to find in Rome and imposed on Athens.

22. [Dem.] 59.59–61.

23. For example, IG. I^3, 102 = Meiggs/Lewis No. 85, liness 15–17; IG. II^2, 17 line 26; 19b lines 7–8; 25 lines 4–7; 109b lines 11–13.

24. IG. I^3, 104 = Meiggs/Lewis No. 86, lines 13–19; the text is restored securely from [Dem.] 43.57.

25. The social and legal significance of these rituals has been expounded by J. Rudhardt, "La reconnaissance de la paternité, sa nature et sa portée dans la société athénienne," *MH.* 19 (1962): 39–64. The following is a sample of illustrative texts.

The *gamēlia* is mentioned by Isai. 3.76, the *dekatē* for a boy by Dem. 39.22 and [Dem.] 40.28 and 59, and the *dekatē* for a girl by Isai. 3.30–34. The regulations of the Dekeleieis are IG. II^2, 1237 (cf. note 21 above), mentioning the *meion* and the *koureion*. The same inscription (lines 109–11) states the oath to be sworn by witnesses when a son is introduced to the phratry. The formal introduction and the *koureion* are simultaneous in Isai. 6.21–22. For the oath sworn by the father at the formal introduction, see Isai. 8.19; Dem. 57.54; [Dem.] 59.59–60 (introduction to phratry and *genos*); Andok. 1.127 (introduction to *genos*). At [Dem.] 43.11–14 and 82 a sacrifice, probably the *koureion,* is mentioned as offered on the occasion of the formal introduction. At Isai. 8.19 the formal introduction appears to take place shortly after birth of the son.

26. Dem. 39.23–25.

27. Ar. *AP.* 42.1–2. There has been controversy on the question, whether admission took place when the applicant was eighteen years old or when he was in his eighteenth year (and thus seventeen years old). Useful contributions have been made by J. M. Carter, "Eighteen years old?" *BICS.* 14 (1967): 51–57, and by M. Golden, "Demosthenes and the age of majority at Athens," *Phoenix* 33 (1979): 25–38. I hope to defend elsewhere a solution suggested to me by the Endnote (35–38) to Golden's article: promptly after admission the young men paraded as *ephēboi* for the first time at the beginning of Boedromion (W. Dittenberger, *De ephebis atticis* [Göttingen, 1863], 22–23), so when they were admitted about the beginning of the Attic year eighteen archons were named in reviewing their past lives; that is, they were admitted when they were in their eighteenth year.

28. It is remarkable that in the procedure described by Aristotle (*AP.* 42.1) the only alternatives are citizenship and slavery; the possibility is not envisaged that the applicant may be a free alien. For the implications of this, see R. Sealey, "On lawful concubinage in Athens," *CA.* 3 (1984): 111–33, at 114–15.

29. Inscriptions of Hellenistic and Roman date show that the ephebic year began at or about the beginning of Boedromion: IG. II^2, 1006, 1008, 1009, 1011, 1027–30, 1039, 1043, 2004, 2022, 2037, 2044, 2046, 2050, 2052, 2058, 2059, 2065, 2067, 2068, 2085, 2097, 2103, 2111–13, 2119, 2125, 2208, 2231, 2239, 2243. Dittenberger (note 27 above) argued from a smaller selection of inscriptions. It is a reasonable, though not quite a necessary, inference that the ephebic year began with Boedromion already in the classical period. Cf. C. Pélékidis, *Histoire de l' éphébie attique des origines à 31 avant Jésus-Christ* (Paris, 1962), 215.

30. Isai. 7.16.

31. Isai. 6.18–24; cf. page 8 above.

32. Dem. 57; Aischin. 1.77–78, 86; 2.182; Androtion, *F. Gr. Hist.* III B 324 F 52; Philochoros, *F. Gr. Hist.* III B 328 F 52.

33. This argument was developed with more care by A. Ledl, "Das attische Bürgerrecht und die Frauen I," *WS.* 29 (1907): 173–96; he dismissed Isai. 3.73–76 as hypothetical. Hignett (*HAC.* 56, 60, 144) said that women were registered in phratries, but the only evidence he offered (60 n. 2) was Isai. 3.73, discussed below.

34. Isai. 8.19; cf. 3.80; 6.49–50.

35. In addition to the study by Ledl (note 33 above, continued in *WS.* 29 [1907]: 197–227 and 30 [1908]: 1–46), fundamental importance attaches to H. J. Wolff, "Marriage law and family organization in ancient Athens: A study on the interrelation of public and private law in the Greek city," *Traditio* 2 (1944): 43–95. An informative survey is provided by Harrison, *Law* 1.1–60.

36. A contract of *engyesis* is made and then revoked at Isai. 6.22–24. The form of words employed in *engyesis* is known from Hdt. 6.130; Menander, *Dys.* 842–43.

37. Isai. 3.35; cf. 5.26, where a house is said to be given "in place of the dowry."

38. Wolff (note 35 above), 51–53.

39. [Dem.] 43.51 (the order of the relatives, cf. Isai. 3.72–73; 10.4–5); Ar. *AP.* 43.4; 56.6–7; [Dem.] 46.22. Brief accounts of the *epiklēros* are to be found in standard handbooks, for example, Lipsius, *AR.*, 543–47; Harrison, *Law* 1.9–12. For a full account, see J. E. Karnezis, *The Epikleros (Heiress)* (Athens, 1972).

40. [Dem.] 46.20; Isai. 8.31; 10.12; Harpok. s.v. *epi dietes hēbēsai.*

41. Isai. 3.42, 68; 10.13.

42. Isai. 6.14.

43. [Dem.] 46.20.

44. Dig. 35.1.15, 50.17: "nuptias enim non concubitus sed consensus facit."

45. Isai. 3.39; Dem. 23.53.

46. L. Casson, "The Athenian upper class and New Comedy," *TAPA.* 106 (1976): 29–59, at 54–56.

47. [Dem.] 43.51.

48. Thus D. M. MacDowell, "Bastards as Athenian citizens," *CQ.* NS. 26 (1976): 88–91, enlarging on a suggestion of Harrison, *Law* 1.61–68. MacDowell's argument is challenged by P. J. Rhodes, "Bastards as Athenian citizens," *CQ.* NS. 28 (1978): 89–92.

49. "On lawful concubinage in Athens," *CA.* 3 (1984): 111–33. The case rests mainly on the fortunes of Pamphilos, the son of Mantias, whose affairs are known from Dem. 39 and [Dem.] 40. Pamphilos was born several years after the marriage of his parents had been dissolved, but once the identity of his father had been established he became entitled to an equal share in the estate with his two brothers.

50. The law about the impoverished *epiklēros* ([Dem.] 43.54; cf. Isai. 1.39) does not conflict with these conclusions, since the relatives required to marry her or dower her are assumed to have property.

51. For example, IG. I^3, 81 line 22; 102 lines 30–31; II^2, 8; 80; 86; 180.

52. Ar. *AP.* 26.4; Plut. *Per.* 37.2–3 (the measure of 451/50). Schol. Aischin. 1.39 (the measure of Nikomenes); cf. Dem. 57.30. Athen. 13.577c (the measure of Aristophon). K. R. Walters, "Perikles' citizenship law," *CA.* 2 (1983): 314–36, at 316–20, maintains that the measure of 451/50 did not declare children of mixed parentage to be *nothoi.* But if they were not citizens, they could not inherit immovable property; so they incurred the main disability of *nothoi.*

53. Megakles married a Sikyonian woman and their son was Kleisthenes (Hdt. 6.130–31). Peisistratos had an Argive wife for a time (Hdt. 5.94.1; Ar. *AP.* 17.3–4). Herodotos calls their son *nothos,* but that may be anachronistic, as he wrote after 451/50. Miltiades married a Thracian woman and she bore him Kimon (Hdt. 6.39.2; Plut. *Kim.* 4.1). The mother of Themistokles was probably an alien (Davies, *APF.*, 213–14).

54. S. B. Pomeroy, "Charities for Greek women," *Mnemosyne* 35 (1982): 115–35, at 128–29.

55. Ruschenbusch, *Athenische Innenpolitik,* 83–87.

56. These ideas are drawn from J. K. Davies, "Athenian citizenship: The descent group and the alternatives," *CJ.* 73 (1977–78): 105–21.

57. Dem. 27. 5, 6, 10, 13, 16, 25, 46; 28.14; 29.3 bis. Of the dwelling-house of Aphobos: Dem. 30.35; 31.1, 3 bis, 4, 5, 6, 7 bis.

58. Dem. 27.15, 40, 42, 43, 58 bis, 59, 60; 28.1, 5, 6, 7, 15; 29.29, 42, 43, 57, 59; 30.6.

59. Dem. 27.4.

60. Dem. 27.64; 28.1.

61. Dem. 27.64; 28.11.

62. H. S. Maine, *Ancient Law* (London, 15th ed., 1894), 178.

63. 1252b9–10. For a fuller account of the Greek *oikos,* see W. K. Lacey, *The Family in Classical Greece* (London, 1968), chap. 1.

64. The following are a small sample of this frequent phrase: [Dem.] 43.11; 44.2; Isai. 2.35, 43; 7.30, 31, 43, 44. The speaker of Isaios 7 says that the law requires the archon to ensure that *oikoi* do not become empty (7.30; cf. Ar. *AP.* 43.4); he says that his adversary has made empty an *oikos* which previously performed the liturgy of the trierarchy.

65. Isai. 6.25; cf. Dem.39.6, [Dem.] 40.2.

66. [Dem.] 40.19.

67. Isai. 11.1–3. The women mentioned as possible heirs would be represented by their *kyrioi.* Parts of the same order are confirmed by [Dem.] 43.51; Isai. 7.20, 22. In the case where Isaios 7 was spoken, the estate of Apollodoros was to pass to his female cousin on his father's side, if the court did not uphold his adoption of the speaker. Cf. Lipsius, *AR.,* 540–61; Harrison, *Law* 1.130–32, 138–49; MacDowell, *Law,* 92–95, 98–99.

68. Isai. 11.3; cf. [Dem.] 44.2. IG. I^3, 104 = Meiggs/Lewis No. 86, lines 20–21, cf. 13–16; cf. [Dem.] 43.57.

69. [Dem.] 46.14; cf. 44.68; Dem. 20.102; Ar. *AP.* 35.2; Plut. *Sol.* 21.3. "So as neither to disclaim or claim the inheritance": sons, including adoptive sons, entered directly on an inheritance without awaiting the word of the archon. Sons could not disclaim it and could not disclaim any debts burdening the inheritance. Other heirs could claim or disclaim the inheritance before the archon (Lipsius, *AR.,* 540–42; cf. Ar. *AP.* 56.6 fin.). There has been controversy on the question whether this law envisaged bequest or *adoptio inter vivos.* That it envisaged *adoptio inter vivos* was maintained by L. Gernet, *Droit et société dans la Grèce ancienne* (Paris, 1955), 121–49, and accepted by Harrison, *Law* 1.82–84 and 149–50, by MacDowell, *Law,* 100, and by Rhodes, *Comm.,* 442–43. But the arguments offered by E. Ruschenbusch ("*Diatithesthai ta heautou.* Ein Beitrag zum sogenannten Testamentsgesetz des Solon," *ZSS.* 79 [1962]: 307–11) seem decisive for the older view: the law of Solon dealt with bequest, but litigants drew from it principles about *adoptio inter vivos* (for example, Isai. 2.13–14).

70. Cf. Ruschenbusch, n. 69 above. Solon's archonship is mentioned as a terminal date in Solon F 70 (Plut. *Sol.* 19.4) too.

71. Ar. *AP.* 35.2; Isai. 2.1; 4.16; 6.9; 9.37; [Dem.] 46.16.

72. [Dem.] 44.63–68. The speaker of Isaios 2 was adopted by Menekles, who had no sons. After the adoption the speaker behaved as a dutiful son. With the encouragement of Menekles he took a wife (2.18), and when a son was born to him, he gave him the name Menekles (2.36).

73. Isai. 3.42, 68; 10.13; cf. page 20 above.

74. For example, Isai. 7.14–15; Dem. 27.4; Plat. *Laws* 922a–923c; cf. Isai. 2.14.

75. [Dem.] 46.24.

76. Lys. 19.39. Gernet (note 69 above, 143–45) would explain the possibility of large legacies, as in the will of Konon, by distinguishing between the patrimony of the family, which had to pass to the sons, and assets acquired by the testator

through his own efforts; supposedly he could dispose of the latter by will. That may be sound. But the decisive fact is that a son will not challenge his father's will if he is satisfied with what it assigns to him or does not wish to antagonize other beneficiaries.

77. Dem. 27.4–5. The will of Aristotle, a metic (Diog. L. 5.11–16), consists of provisions for the dependents, including the widow, the children, and the slaves, and for dedications. The terms of the will of Pasion (Dem. 36.33–35; 45.27–28) were disputed but evidently provided for the widow and the children. The flexibility of the Athenian will is illustrated by the testament of Epikouros (Diog. L. 10.16–21). It provided for the continuation of the school under Hermachos of Mytilene as head. Since Hermachos was an alien, he could not inherit immovable property in Attica. So the will inserted two Athenians as heirs but told them to ensure use of the garden and the house to Hermachos and the other members of the school.

78. Gaius 1.55 (of the authority of Roman fathers over sons): "quod ius proprium civium Romanorum est (fere enim nulli alii sunt homines, qui talem in filios suos habent potestatem, qualem nos habemus)." Gaius notes that only the Galatians had a similar institution.

79. This version and a variant are given by Suet. *Tib.* 1. For the many other sources of the main version and for discussion, see Münzer, *RE.*, 3.2663.

80. In choosing someone to adopt as a son one searched among one's relatives first: Isai. 2.20–22.

81. Dem. 24.105–14; Cohen, *Theft,* 62, 68, 74–76. Cf. page 56 below.

82. D. Cohen, "Work in Progress: The enforcement of morals," *Rechtshistorisches Journal* 3 (1984): 119–20; idem, "The Athenian law of adultery," *RIDA.*, 3d ser., 31 (1984): 147–65.

83. Dem. 18.132.

Chapter 3

1. M. Fränkel, "Der attische Heliasteneid," *Hermes* 13 (1878): 452–66.

2. M. H. Hansen, "Did the Athenian *ecclesia* legislate after 403/2 B.C.?" *GRBS.* 20 (1979): 27–53, at 27–31. The provision mentioned by Andok. 1.87 will receive attention below (page 38).

3. Hansen, note 2 above. Hansen presents a strong case, but possibly the question would repay further scrutiny. Some measures, such as IG. II^2, 125 and 204, were passed as decrees and took temporary steps to deal with a transitory situation but also stated general and permanent rules. Even so, it follows from Hansen's study that one should not endorse the fourth-century allegation that the Athenians determined everything by decrees without regard to the laws (Dem. 20.91–92; Ar. *AP.* 41.2; cf. Ar. *Pol.* 4.1292a4–7, 23–25, 32–37; 1293a9–10; 1298b14–15; 5.1305a28–32; 1310a3–4; 6.1317b28–30). That was evidently one of the stock grounds for scolding the Athenians.

4. Lys. 30.4. It is not clear whether in this his second term of service Nikomachos was a mere "recorder" (*anagrapheus*) of laws or a *nomothetēs*. Lysias tries to suggest the latter at 30.27–28, associating him with Teisamenos, but the suggestion may be merely a prosecutor's attempt to make the alleged outrage seem worse. The language of 30.4 suggests a "recorder."

5. Andok. 1.82 and 85 (the wall in the *stoa basileios*). The largest fragment was published by J. H. Oliver, "Greek inscriptions," *Hesperia* 4 (1935): 1–32. Several more fragments were published by S. Dow, "Greek inscriptions," *Hesperia* 10 (1941): 31–37. Among further epigraphic studies, two by Dow conclude work of many years: "The Athenian calendar of sacrifices: The chronology of Nikomachos' second term," *Historia* 9 (1960): 270–93, with bibliography, and "The walls inscribed with Nikomachos' law code," *Hesperia* 30 (1961): 58–73. Historical conclusions have been drawn by Dow, "The law codes of Athens," *Proceedings of the Massachusetts Historical Society* 71 (1953–57; published 1959): 3–36.

6. Plut. *Arist.* 7.6; cf. Philochoros, *F. Gr. Hist.* III B 328 F 30. G. A. Lehmann ("Der Ostrakismos-Entscheid in Athen: von Kleisthenes zur Ära des Themistokles," *ZPE.* 41 [1981]: 85–99) has revived the view that for validity ostracism required, not a quorum of 6,000 voters, but at least 6,000 votes against one candidate. But his argument depends on a note of doubtful value in a late manuscript (cf. J. J. Keaney and A. E. Raubitschek, "A Byzantine account of ostracism," *AJP.* 93 [1972]: 87–91).

7. The first statue of a living man set up by the Athenians in the agora was that of Konon (Dem. 20.70; cf. IG. II^2, 3774). Later they set up a statue of Chabrias and voted him a crown (Aischin. 3.243; Dem. 24.180, cf. 20.84; A. P. Burnett and C. Edmonson, "The Chabrias monument in the Athenian agora," *Hesperia* 30 [1961]: 74–91). Others receiving honors included Iphikrates, Timotheos, Lykourgos, and Demosthenes (Dem. 20.84; [Plut.] *Ten Orators* 850f–851c, 851f–852e).

8. In 411 the revolutionaries said that the assembly had never drawn an attendance as high as 5,000 (Thuc. 8.72.1). The fact that ostracisms had sometimes taken place suggests that they were not telling the truth. But the failure to complete an ostracism after that of Hyperbolos (Plut. *Nik.* 11; *Arist.* 7; cf. *Alk.* 13) is more suggestive of the numbers who attended the assembly in the fourth century. The *prytaneis* continued to ask the assembly once each year whether it wished to hold an ostracism (Ar. *AP.* 43.5); perhaps the answer was sometimes negative, and perhaps sometimes it was not possible to bring 6,000 voters together. M. H. Hansen (Volks-Versammlung, 24–26) has argued that a large attendance, about 6,000, was frequent in the fourth century; for grants of citizenship were frequent, and [Demosthenes] 59.89–90 says that for such a grant the law required a second meeting of the assembly and a quorum of 6,000. The argument is persuasive, because [Demosthenes] is fully explicit in his assertion. Yet the orator has just said that a law provides that citizenship should be granted only on grounds of "merit" (*andragathia*). This assertion makes it difficult to believe that the orator is telling the plain truth.

9. Thuc. 2.37.3. Nothing need be said here about the "unwritten *nomima* of the gods," mentioned by Antigone (Soph. *Ant.*, 454–55). They are not laws but the traditional practice of performing funeral rites for one's deceased relatives; see B. M. W. Knox, *The Heroic Temper: Studies in Sophoclean Tragedy* (California, 1964), 94–98.

10. Lys. 6.10. Blass (*Att. Bered.*, 567–70) argued that the speech was not by Lysias. If the view developed by K. J. Dover is right (*Lysias and the Corpus Lysiacum* [California, 1968]), it is prudent to suspend judgment on the authorship of most of the speeches attributed to Lysias. But there is no good ground to doubt that speech 6 was delivered at the trial in 400/399. The date of the trial is inferred from Andok. 1.132.

11. If my memory is accurate, this suggestion was made orally by the late H. T.

Wade-Gery. The Megarians were alleged to have encroached on the sacred land at Eleusis (Thuc. 1.139.2).

12. Athenian law also had a nonpositivist element, contained in the oath of *dikastai* (note 1 above): "I will vote in accordance with the laws and the decrees of the people of Athens and of the council of five hundred, *and on matters where there are no laws, I will vote in accordance with the most just opinion.*" No system is wholly positivist, since the law cannot foresee the variety of human ingenuity and human malice. If a wholly positivist system were attained, there would be nothing left for judges to do.

13. Andok. 1.87. The same measure is quoted by Dem. 23.87, cf. 24.30.

14. For example, Dem. 20.91; 22.5.

15. Lys. 6.29. From 6.24 and 52 it appears that the measure thus confirmed was the sentence of *atimia* which had been inflicted on Andokides.

16. For example, Lys. 6.52; Andok. 1.82–89; Dem. 20.89–91; 23.25, 27, 29, 37; 24.17, 25, 30, 33, 51, 59, 62; Ar. *AP.* 7.1, cf. 12.4; Xen. *Hell.* 2.3.2 and 11.

17. Xen. *Mem.* 1.2.42, discussed below (page 46).

18. The total of *dikastai,* revised each year, was 6,000. The figure is attested for the fifth century (Aristoph. *Wasps* 662; Ar. *AP.* 24.3; cf. Andok. 1.17). That the same total, with annual revision of the list, was maintained in the fourth century has been argued by J. H. Kroll, *Athenian Bronze Allotment Plates* (Cambridge, Mass., 1972), 69–90; Kroll's argument is summarized and accepted by Hansen, *Folkedomstolen,* 16–18. The coincidence of the quorum for *privilegia* with the total of *dikastai* might suggest that the measure restricting *privilegia* envisaged a meeting, not of the assembly of citizens, but of the whole body of *dikastai.* But the similarity of *privilegia* to votes of ostracism by the assembly points to the opposite conclusion. It is doubtful whether the 6,000 *dikastai* ever sat as a single body (in spite of Andok. 1.17, which may be tendentious); the largest court known to have sat numbered 2,500 *dikastai* (Dein. 1.52). Probably 6,000 was stated as the quorum for *privilegia,* as for votes of ostracism, because it was the largest assemblage of citizens that could be hoped for.

19. Plentiful information on the activities of the council and the assembly is collected by Rhodes, *Boule.*

20. Earlier inquiries were superseded by U. Kahrstedt, "Untersuchungen zu athenischen Behörden II: die Nomotheten und die Legislative in Athen," *Klio* 31 (1938): 1–32. Other important studies include Wolff, *Normenkontrolle*; F. Quass, *Nomos und Psephisma. Untersuchungen zum griechischen Staatsrecht* (Zetemata 55, Munich, 1971); M. H. Hansen, "*Nomos* and *Psephisma* in fourth-century Athens," *GRBS.* 19 (1978): 315–30. An up-to-date account is provided by Hansen, *Nomotheterne.* D. M. MacDowell, "Law-Making at Athens in the fourth century B.C. ," *JHS.* 95 (1975): 62–74, offers a useful collection of texts; part of his thesis has been criticized by Hansen, "Athenian *nomothesia* in the fourth century B.C. and Demosthenes' speech against Leptines," *C et M.* 32 (1980): 87–104.

21. Dem. 20.89–100; 24.20–38; Aischin. 3.38–39. The most informative of these passages is the one in Dem. 24. Our manuscripts of that passage include the texts of some laws and a decree. The authenticity of these is guaranteed in part by the comments of Demosthenes. The authenticity of the documents given in our manuscripts of the orators was discussed by E. Drerup, "Über die bei den attischen Rednern eingelegten Urkunden," *Jahrbücher fur classische Philologie,* Supplementband 24 (1898): 221–366. There do not appear to be grounds to add seriously to Drerup's findings.

22. In approximately chronological order: SEG. 26.72 (first published by R. S. Stroud, "An Athenian law on silver coinage," *Hesperia* 43 [1974]: 157–88); IG. II^2, 140; SEG. 30.61 (first published by K. Clinton, "A law in the city Eleusinion concerning the mysteries," *Hesperia* 49 [1980]: 258–88); IG. II^2, 244; SEG. 12.87; 18.13; IG. II^2, 333; 412 (republished with improved readings by M. H. Hansen, "IG. II^2 412: A fragment of a fourth-century Athenian law, *C et M.* 33 [1981–82]: 119–23).

23. IG. II^2, 222 lines 41–46; 330 lines 18–23; VII, 4254.

24. M. H. Hansen, "Initiative and decision: The separation of powers in fourth-century Athens," *GRBS.* 22 (1981): 345–70, at 347–51.

25. Dem. 24.20–25. Evidently at the time of this speech (353/52) there were three meetings of the assembly in each prytany. There were four at the time when Aristotle wrote *AP.* 43.4–6. The change has been studied by M. H. Hansen and F. Mitchel, "The number of ecclesiai in fourth-century Athens," *SO.* 59 (1984): 13–19.

26. Dem. 24.27.

27. Dem. 24.33.

28. Ar. *AP.* 44.2–3; D. M. Lewis, "Notes on Attic inscriptions," *ABSA.* 49 (1954): 17–50, at 31–34; W. K. Pritchett, "Lucubrationes Epigraphicae," *CSCA.* 5 (1972): 153–81, at 164–69.

29. Dem. 24.33; SEG. 12.87 line 3; IG. II^2, 140 lines 4–5.

30. That the proedroi in the two tasks were different is the opinion of Rhodes (*Boule,* 28) and MacDowell (note 20 above, 63). Hansen argued that they were the same in "*Hoi proedroi ton nomotheton.* A note on IG II^2 222, 41–52," ZPE. 30 (1978): 151–57. Later (*Embedsmaendene,* 95–96, n. 85) he concluded that they were different, because at Dem. 24.71 the *epistatēs* of the *proedroi* of the lawgivers has the demotic Myrrinousios and therefore belongs to the *phylē* Pandionis, which supplied the current *prytaneis.* But it is easy to emend "Myrrinousios" to "eg Myrrinouttēs," as Drerup suggested; cf. Lewis (note 28 above), 32.

31. Dem. 24.27 fin. (cf. Andok. 1.84; page 36 above). Although the principle is only attested here, the brevity of the reference to it shows that it was generally understood.

32. SEG. 26.72 line 1; IG. II^2, 140 lines 7–8; 244 line 6; SEG. 12.87 lines 6–7; 18.13 line 7. As observed by Clinton (note 22 above, 260), the fact of publication on stone may in some cases have been sufficient evidence of validity without a ratificatory prescript, but this possibility does not bear on the question of the source of authority.

33. I tried to follow up this suspicion in "On penalizing Areopagites," *AJP.* 79 (1958): 71–73 = *Essays,* 183–85.

34. Note 20 above, 4–5; cf. Hansen, note 2 above, 39–43.

35. Ar. *AP.* 59.2 notes both procedures. The distinction between them has been clarified by Hansen, *Sovereignty.*

36. Dem. 24.138.

37. Dem. 24.33–35; cf. 20.93.

38. Liv. 7.17.12 (=Twelve Tables 12.5); cf. 9.34.6–7. The principle is illustrated by the tradition on *conubium* between patricians and plebeians. Allegedly this was forbidden by the Twelve Tables (11.1) but allowed a few years later by the *lex Canuleia* (Cic. *de re p.* 2.63; Liv. 4.1.1; 4.4.5; 4.6.3–4; Dion. Hal., *Antiq. Rom.* 10.60.5). Whether the tradition was historically accurate is a question that need not be asked here. The tradition reflected Roman belief about the validity of laws.

39. Lys. 30.2.

40. IG. I^3, 104 = Meiggs/Lewis No. 86; Stroud, *Drakon's Law.*

41. Hes. *Works* 276–85. For sophistic views, see, for example, Thrasymachos in Plat. *Rep.* 1.338c–339a; Kallikles in Plat. *Gorg.* 482e–484c; Antiphon Sophista B 44 (Diels/Kranz[7]).

42. Recognized by Kahrstedt (note 20 above, 6); cf. M. Ostwald, *Nomos and the Beginnings of the Athenian Democracy* (Oxford, 1969), 2.

43. For example, about the middle of the fifth century the Athenians exacted oaths from the Erythraians (IG. I^3, 15; cf. R. Meiggs, *The Athenian Empire* [Oxford, 1972], 421–22), from the Milesians (IG. I^3, 21 lines 69–71), and from the Kolophonians (IG. I^3, 37 lines 43–56 = Meiggs/Lewis No. 47, lines 42–55). They exacted an oath from the cities of Keos toward 363 (IG. II^2, 111 = Tod II No. 142, lines 69–81). Unlike the usual oaths ratifying treaties, these oaths were part of a settlement of strife within the city.

44. For example, H. L. A. Hart, *The Concept of Law* (Oxford, 1961).

45. Solon fr. 36 (West), lines 18–20 (*apud* Ar. *AP.* 12.4). Ostwald (note 42 above, 12–56) offers further reflections on the terms *thesmos* and *nomos*.

46. Ar. *AP.* 29.3.

47. Andok. 1.17 and 22. It is odd that the only argument known to have been employed in this trial bore, not on the question of the legality of the decree, but on a separate question of fact (whether Leogoras had been present at the profanation of the mysteries). Wolff (*Normenkontrolle,* 45–54) explains this, perhaps rightly, by supposing that in 415 the practice of legal argument was less well developed than in the time of Demosthenes. Another case of *graphē paranomōn* is known from 414 or earlier: Demosthenes the general indicted someone and Antiphon composed a speech for his defense ([Plut.] *Ten Orators* 833d; Harpok. s.v. *keleontes;* Antiph. frr. 8–14 Blass). But too little is known about this case to indicate anything more about the institution.

48. Thuc. 8.67; cf. Ar. *AP.* 29.4–5.

49. Xen. *Hell.* 1.7.12–13 and 20–23.

50. In "On the Athenian concept of law," *CJ.* 77 (1981–82): 289–302, at 300, I tried to place the creation of the *graphē paranomōn* between 427 and 415. Many of the views expressed in the present chapter were first presented in that article. I thank the editors of *The Classical Journal* for permission to draw on that material again.

51. For example, Thuc. 3.37.3; Dem. 24.139–43.

Chapter 4

1. Harpok. s.v. *anakrisis*. For the standard sizes of *dikastēria*: Ar. *AP.* 53.3; 68.1; Dem. 24.9; Poll. 8.123; Harpok. s.v. *hēliaia*. Only one extant inscription (IG. II^2, 1641 lines 25–33) preserves the number of *dikastai* who voted at a trial. This says that 100 voted for the plaintiff and 399 for the defendant.

2. Isok. 18.1–3. Good accounts of the *paragraphē* are offered by Lipsius, *AR.*, 846–56, and Harrison, *Law* 2.106–24. For a full study, one should consult H. J. Wolff, *Die attische Paragraphe* (Graezistische Abhandlungen, Band 2, Weimar, 1966), passim, esp. 119–21. D. M. MacDowell ("The chronology of Athenian speeches and legal innovations in 401–398 B.C.," *RIDA.*, 3d ser. 18 [1971], 267–73, at 269) offers strong reasons to believe that the law of Archinos was passed in 401/0.

3. Poll. 8.41; cf. Lys. 1.44; Isai. 11.28.

4. Lipsius, *AR.*, 344–49. The same reasoning applies to the *graphē adikōs heirchthēnai hōs moichon* (the plea that someone had been unjustly seized as an adulterer, [Dem.] 59.66); the man who had been seized was for that reason unable to initiate action (cf. E. Ruschenbusch, "Der Ursprung des gerichtlichen Rechtsstreits bei den Griechen," *Symposion 1977* [Cologne and Vienna, 1982], 1–8, at 5–7).

5. Ar. *AP.* 3.4.

6. Isai. 11.34. The traditional distinction has been defended against critics by E. Ruschenbusch, "*Dikē kata tinos* und *pros tina*," *ZSS.* 86 (1969): 386–94.

7. Accounts may be found in standard handbooks; for example, Lipsius, *AR.*, 176–219, 299-338, and Harrison, *Law* 2.49–64, 211–32. G. M. Calhoun (*The Growth of Criminal Law in Ancient Greece* [Berkeley, 1927], 57–62) compared the special procedures with the *graphē* and inclined to suggest that they had an earlier origin.

8. Ar. *AP.* 52.1; Lys. 13.85–86; Dem. 24.113–14; Aischin. 1.91. The material has been collected and discussed by Hansen, *Apagoge.* Some of Hansen's views are criticized by Cohen, *Theft,* 52–61.

9. Dem. 24.113; Cohen, *Theft,* 74–75. As Cohen argues, these provisions apply to the thief who breaks into the house. Cf. page 30 above.

10. Information about the scandal comes from four speeches: Hyper 5 (Kenyon), Dein. 1, 2, 3. On the procedure, see especially Hyper 5.2–5; Dein. 1.45. Up-to-date discussion is provided by J. A. Goldstein, *The Letters of Demosthenes* (New York and London, 1968), 35–44.

11. Cf. Hansen, *Eisangelia,* 9–11. The cases of Antiphon and others (Dem. 18.132–34; Dein. 1.62–63) may illustrate *apophasis,* perhaps in its early development. They are often dated 346–343 (Hansen, *Eisangelia,* 56), but a date as late as 340 is possible and indeed defensible (R. Sealey, "On penalizing Areopagites," *AJP.* 79 [1958]: 71–74 = *Essays,* 183–85).

12. MacDowell (note 2 above), 270–71. The law instituting public arbitrators is mentioned by Lys. fr. 16 Thalheim = fr. XXXVII, 1 Gernet/Bizos. Cf. Bonner and Smith, 1.353.

13. Ar. *AP.* 26.3. Aristotle says that they were instituted "again" in 453/52. He has said (16.5) that they were instituted by Peisistratos. Many have accepted this, perhaps rightly. It is a little troublesome that Aristotle does not say anything about their being abolished in the meantime. It is also troublesome that no good reason for abolishing them can be conjectured. For contrasting views, see Day and Chambers, *Aristotle's History,* 95–96, and Rhodes, *Comm.,* 215 and 331.

14. Aristoph. *Wasps* 156–57, 240–44, 288–89, 303–6; Ant. 6.21 and 23. Likewise, each courtroom was assigned to a specific magistrate for the whole year (at least): Aristoph. *Wasps* 1107–11; Ant. fr. 42 (Blass/Thalheim) *apud* Harpok. s.v. *parabyston.* Probably a larger number of *dikastai* was assigned to each court than it required, so men arriving late did not serve or receive pay: Aristoph. *Wasps* 686–90, 774–75. Annual revision of the list of 6,000 is inferred from Aristoph. *Wasps* 400. Good accounts of the three successive methods of assigning *dikastai* to courts are provided by Bonner and Smith, 1.224–50, 370–78; Harrison, *Law* 2.45–46, 239–41; Lipsius, *AR.*, 136–50; Hansen, *Folkedomstolen,* 19–20.

15. Aristoph. *Ekkl.* 681–92; *Plout.* 277–78, 972, 1166–67. The *Ploutos* was produced in 389/88 according to its fourth hypothesis. The possible dates for the *Ekklesiazousai* are 393–92 and 392/91; see P. Funke, *Homonoia und Arche* (Historia Einzelschriften 37 [1980]), 168–71. A. L. Boegehold ("Many Letters: Aristophanes

Plutus 1166–67," in *Studies Presented to Sterling Dow* [Durham, N.C., 1984], 23–29, at 24–25) suggests that this mode of assigning *dikastai* to courts was introduced not in 403/2, as often supposed, but about 409.

16. See Ar. *AP.* 63–69 for this method of assigning *dikastai* to courts; cf. 53.2–3 on written testimony. For the date, see G. M. Calhoun, "Oral and written pleading in Athenian courts," *TAPA.* 50 (1919): 177–93. Calhoun suggested associating the changes with the creation of the Second Athenian League in 378 and with the attendant military and naval measures. Although the chronology is good, it is difficult to see a connection of policy beyond a need to direct man power more economically. See also page 177, note 88, below.

17. Ar. *AP.* 27.3; *Pol.* 2.1274a8–9; cf. Plut. *Per.* 9.3. Attempts to date the introduction of dikastic pay (notably by H. T. Wade-Gery, "Two notes on Theopompos," *AJP.* 59 [1938]: 129–34, at 131–34 = *Essays,* 235–38) have not been decisive (see Rhodes, *Comm.,* 339–40).

18. Dem. 24.148; Hyper. 4.40 (Kenyon).

19. *Knights* 798; *Wasps* 195, 772, 891; *Lys.* 380.

20. Dem. 23.28. The same word usage, with the distinction between "judging" (*dikazein*) and "deciding" (*diagnōnai*), is observed in the law of Drakon as reinscribed in 409/8 (IG. I^3, 104 = Meiggs/Lewis No. 86, lines 10–12). There the kings are to "judge," but the *ephetai* are to "decide." Cf. note 47 below.

21. (a) IG. I^3, 40 = Meiggs/Lewis No. 52, lines 75–76. The probable date is 446/45, although a date in 424/23 has been defended by H. B. Mattingly, "Athens and Euboea," *JHS.* 81 (1961): 124–32. (b) Ant. 6.21. Here *hēliaian* is a very probable emendation for *hēliakēn.* The date 419/18 for this speech has been reached by identifying the Aristion of 6.35 with the archon of 421/20; cf. K. J. Dover, "The chronology of Antiphon's speeches," *CQ.* 44 (1950): 44–60, at 44.

22. A particularly persuasive statement of the "older" theory is provided by H. T. Wade-Gery, *Essays,* 171–200 (the earlier of these two chapters, "Themistokles' Archonship," was previously published in *ABSA.* 37 [1936–37; published 1940]: 263–70). For a briefer statement, see Lipsius, *AR.,* 27–30, and for recent reiteration, MacDowell, *Law,* 30–32. The "newer" theory has been developed by Ruschenbusch in two articles ("*Ephesis.* Ein Beitrag zur griechischen Rechtsterminologie," *ZSS.* 78 [1961]: 386–90, and "*Hēliaia*: Die Tradition über das solonische Volksgericht," *Historia* 14 [1965]: 381–84), and by M. H. Hansen ("The Athenian *Heliaia* from Solon to Aristotle," *C et M.* 33 [1981–82]: 9–47).

23. Nemea (IG. IV, 479 line 1); Mykenai (IG. IV, 497 line 2; Schwyzer, *Dialectorum graecarum exempla epigraphica potiora* [Leipzig, 1923], 99 line 2); Argos (Schwyzer 83 B line 25; 90 line 2; 91 line 2; 92 line 2; W. Vollgraff, "Novae inscriptiones Argivae," *Mnemosyne* 44 [1916]: 217–38, at 221); Orchomenos (Schwyzer 666 line 6); Epidamnos (Ar. *Pol.* 5.1301b23). *Aliastai* are attested as a court at Tegea (Schwyzer, 656 line 24).

24. Kerkyra (IG. IX [1], 682 line 5), Akragas (IG.XIV, 952 line 10), Rhegion (IG XIV, 612 line 1), Heraclea in Lucania (IG. XIV, 645, I line 118 and II line 10), Byzantion (Dem. 18.90).

25. Hdt. 1.125.2; 5.29.2; 5.79.2; 7.134.2.

26. An act is only an appeal if there is an authoritative judgment to be appealed. In cautious language Wade-Gery (note 22 above, *Essays,* 192) maintained that *ephesis* is always "the act of a 'litigating party' who, being dissatisfied with an authoritative pronouncement made about his case, *appeals against it* to some other authority" (his italics).

27. Arguing against Lipsius and others, Wade-Gery (note 22 above) attributed the change to Ephialtes. Many years ago the present writer accepted the "older" theory and thought that the change was not brought about by anyone's enactment but came about as a change of custom, when archons, chosen by lot since 487, ceased to assert themselves ("Ephialtes," *CP.* 59 [1964]: 11–22 = *Essays,* 42–58).

28. Pollux 8.62 has an explanatory note beginning thus: "*Ephesis* occurs when someone transfers a case from arbitrators or archons or fellow-demesmen to *dikastai* (?), or from the council to the demos, or from the demos to a *dikastērion,* . . ." Pollux's note appears erudite. One of the illustrations, *ephesis* from the demos to a *dikastērion,* poses a difficulty for holders of the "older" view, since they believe that the classical *dikastēria* derived their authority from the supposed judicial competence of the assembly; for appeal should be from the lesser body to the greater. But not much confidence can be placed in Pollux's note, since the text has corruptions and he wrote at a time late enough to be influenced by Roman practices of appeal.

29. Ar. *AP.* 53.2; Dem. 29.59; [Dem.] 40.31.

30. Dem. 57.6; Isai. Lost speech VII (Forster).

31. [Dem.] 34.21. For the date, see Blass, *Att. Bered.* III^2, 1, 578.

32. For recent discussion, with reference to predecessors, see J. M. Balcer, *The Athenian Regulations for Chalkis* (Historia Einzelschriften Heft 33 [1978]), 102–18, esp. 108–9. Balcer decides against a mere right of appeal.

33. J. Gaudemet, *Institutions de l'antiquité* (Paris, 1967), 646–47; cf. 627–28 on the collaboration of the parties. It is also to be noted that in the monarchical conditions of the third century A.D. and later appeal was important in the procedure of *cognitio extra ordinem* (ibid., 802–3).

34. Ar. *AP.* 63.3.

35. I owe this solution to Mr. Dennis L. Anderson. He is not responsible for any defects in my account of it. In *AP.* 3.5 the crucial word, rendered above as "to decide," is partly missing at a lacuna in the London papyrus and has been restored in the light of Ar. *Pol.* 4.1298a30. For the usual way of understanding *AP.* 3.5, see Rhodes, *Comm.,* 106.

36. M. H. Hansen, "Demos, Ecclesia and Dicasterion in classical Athens," *GRBS.* 19 (1978): 127–46. Historians and philosophers often, on the other hand, and very rarely orators (for example, Aischin. 1.141) use *demos* of "the common people" and insist that the *dikastērion* is an organ of the common people.

37. E. Ruschenbusch, "*Dikastērion pantōn kyrion,*" *Historia* 6 (1957): 257–74, at 263–67.

38. Hellanikos, *F. Gr. Hist.* III B 323a Fl; Eurip. *El.* 1258–63; *I.T.* 945–46. Cf. R. Sealey, "The Athenian courts for homicide," *CP.* 78 (1983): 275–96, at 288–89. Many of the views expressed in this section are developed more fully in that article. I thank the editors of *Classical Philology* for permission to draw on the material anew. The article drew in turn on the arguments of E. Ruschenbusch, "*Phonos.* Zum Recht Drakons und seiner Bedeutung für das Werden des athenischen Staates," *Historia* 9 (1960): 129–54.

39. Poll. 8.117; Etym. Mag. 131.13 s.v. *apophrades*; Etym. Gud. s.v. *apophrades.* For discussion, see W. K. Pritchett, *The Greek State at War, Part III*: *Religion* (California, 1979), 209–29.

40. Solon F 70 = Plut. *Sol.* 19.4. The explanation followed here was proposed and defended more precisely by Ruschenbusch (note 38 above), 132–35.

41. I am indebted to D. Cohen for the suggestion that the categories of justifiable homicide, though disparate to the modern mind, may all be analyzed as killing in

places where violence is permitted. He is not to blame for any inadequacies of my formulation.

42. *Il.* 9.632–36; 13.659; 16.398; 18.498.

43. *Il.* 14.483. Likewise, "recompense" is the root sense in the more puzzling sentence at *Il.* 17.206–8.

44. For example, ransom for the living captive: *Il.* 1.13; 1.95; 1.111; 2.130. For the corpse: *Il.* 24.137 and 139. On the battlefield: *Il.* 6.46; 10.380.

45. *Il.* 9.120; 19.138. On the moral and psychological ideas involved, reference may be made to E. R. Dodds, *The Greeks and the Irrational* (California, 1951), 2–8.

46. Solon F 12 = Bekker, *Anec.* 428.9 s.v. *apoina,* Suda A 3716 s.v. *apoina.*

47. Dem. 23.28 = Solon F 16. The wording shows that the law is early (note 20 above). The text refers to an *axōn,* but this reference does not show what the relation of this law was to the *axones* of Solon (or Drakon).

48. Photios s.v. *poinān kai apoinān* = Solon F 11.

49. Poll. 9.61 = Solon F 10.

50. Ruschenbusch (note 38 above), 139.

51. IG. I^3, 104 = Meiggs/Lewis No. 86, lines 10–16 and 20–21; Ruschenbusch (note 38 above), 137–38.

52. The text as reinscribed (IG. I^3, 104 = Meiggs/Lewis No. 86) opens with provisions about involuntary homicide. Cf. Ruschenbusch (note 38 above), 142–43 and passim. The surprising manner in which the text opens has prompted several hypotheses; for discussion, see Sealey (note 38 above), 291–92 and 294 n. 40. On the inscribed text only one observation need be added here. Stroud's study (*Drakon's Law*) has shown that the text was a good deal longer than the part which can be read and reconstructed. Even that part includes rulings on several different issues, including who is to judge the charge of involuntary homicide, who is authorized to take part in *aidesis,* whether the provisions are to be retroactive, who is to take part in the opening proclamation against the killer, who is to join in the prosecution, under what conditions the killer's life shall be spared, and under what conditions killing in self-defense is allowed. It is most unlikely that all these issues first came to require statutory regulation at the same time. Therefore the text of 409/8 is in all probability a compendium of laws which had been issued at different times. Greek chronographers assigned the work of Drakon to 621/20. The tradition is uniform (Stroud, *Drakon's Law,* 66–70) but late; it may rest wholly on Apollodoros. If the different laws of homicide arose at different dates, one cannot tell which of them was issued in 621/20. At least those historians who believe that the whole code, as reinscribed in 409/8, had been issued in 621/20 may be challenged to say precisely what difference that legislation made in 621/20 (cf. page 115 below).

53. Soph. *Trach.* 727–28; Ant. 1.3, 5, 19–20, 26; 6.19; Dem. 21.42–43; Ar. *Mag. Mor.* 1188b31–37.

54. IG. I^3, 104 = Meiggs/Lewis No. 86, line 17 (cf. 24–25), restored from the law in [Dem.] 43.57; Poll. 8.125. Androtion *F. Gr. Hist.* 324 F 4a and Philochoros 328 F 20b are preserved only by Maximus in commenting on Dionysios Areiopagita; Maximus says that the Areopagos numbered fifty-one, because he confuses it with the *ephetai*; cf. Jacoby, *F. Gr. Hist.* III b (Supplement) I, 114. Neither the figure nor probably the word *ephetai* is given in Ar. *AP.* 57.4; on the reading, see M. Chambers, "Notes on the text of the *Ath. Pol.*," *TAPA.* 96 (1965): 31–39, at 38–39.

55. M. Gagarin, "Hesiod's dispute with Perses," *TAPA.* 104 (1974): 103–11, at 105.

56. *Il.* 23.573–80. At 23.542 *dikē* is an objection or plea uttered by one of the

disputing parties. *Dikē* as a settlement imposed by a judge is illustrated by *Od.* 11.568–70; *Il.* 16.542. So a man who gives judgments is *dikaspolos*: *Il.* 1.238; *Od.* 11. 184–87. The verb *dikazein* is used of the judge who gives judgments: *Od.* 11.547; *Il.* 8.431; 1.542. Correspondingly, *dikazesthai* in the middle is used of the party who seeks a judgment from a judge: *Od.* 11.545; 12.439–40.

57. My ideas have been stimulated by the following: H. S. Maine, *Ancient Law* (London, 15th ed., 1894), 377; W. Leaf, *The Iliad* (London, 2d ed., 1902), II, 610–14; H. H. Pflüger, "Die Gerichtsszene auf dem Schilde des Achilleus," *Hermes* 77 (1942): 140–48; H. J. Wolff, "The Origin of judicial litigation among the Greeks," *Traditio* 4 (1946): 31–87, esp. 34–49; M. Gagarin, *Drakon and Early Athenian Homicide Law* (New Haven, 1981), 13–16; E. Ruschenbusch, note 4 above.

58. Gaudemet (note 33 above), 627–28.

59. On the negatives in Homeric Greek, reference may be made to P. Chantraine, *Grammaire homérique, II Syntaxe* (Paris, 1953), 330–39; at 335 n. 1 Chantraine discusses this passage. The interpretive arguments offered here have been presented by Gagarin (note 57 above), except for the argument from the negative, which was presented by Leaf (note 57 above). The solution adopted here is Gagarin's, although he is not responsible for the further inference about the rudimentary character of the procedure.

60. *Litis contestatio,* cf. Gaudemet (note 33 above), 637–39. In the *legis actio sacramento* (Gaius 4.13–17) the issue was joined on the question, which of the wagers offered by the parties was valid. In the earliest Athenian procedure for homicide the issue was probably joined on the question whether the act had been involuntary (pages 76–77 above).

61. Xen. *Lak. Pol.* 10.2.

62. Solon F 70 = Plut. *Sol.* 19.4; page 73 above. Whether the jurisdiction of the Areopagos concerning sacred olives (Lys. 7; Ar. *AP.* 60.2; Lipsius, *AR.*, 128–29) is early cannot be determined and is not important.

63. For example, an inscription found at Delphi and probably to be dated between 262 and 251 gives a treaty between Delphi and Pellana for deciding disputes between citizens of the two communities. It distinguishes between two organs. The plaintiff is to address himself first to "the magistracy" (*ha archa*). The case will then be decided by *dikasteres*. See B. Haussoullier, *Traité entre Delphes et Pellana* (Bibliothèque de l'école des hautes études, fasc. 222, Paris, 1917).

64. Hes. *Works* 39, 221, 264; cf. Gagarin (note 55 above), 109.

65. Hes. *Works* 9, 263.

66. Hes. *Works* 202–12, 225–73; *Theog.* 84–87; cf. Wolff (note 57 above), 57–62.

67. Rhodes, *Boule,* 147–62; Hansen, *Eisangelia*; P. J. Rhodes, "*Eisangelia* at Athens," *JHS.* 99 (1979): 103–14; M. H. Hansen, "Eisangelia in Athens: A reply," *JHS.* 100 (1980): 89–95; R. Sealey, "Ephialtes, *Eisangelia* and the Council," in G. S. Shrimpton and D. J. McCargar, eds., *Classical Contributions: Studies in Honor of M. F. McGregor* (Locust Valley, N.Y., 1981), 125–34.

68. Hyper. 4.4–8 (Kenyon) mentions an *eisangeltikos nomos* and gives a limited list of offenses for which the procedure was available. The *eisangeltikos nomos* is mentioned in the law *apud* Dem. 24.63. Those who hold that the list of offenses for which *eisangelia* was available was limited are represented in recent discussion by Hansen (note 67 above). The other view, that the law of *eisangelia* had a "non-specific strand," is held by Rhodes. Those who would restrict the procedure to a limited list have had to extend the list; see notably T. Thalheim, "Zur Eisangelie in Athen," *Hermes* 37 (1902): 339–52.

69. Ar. *AP.* 8.4; cf. page 73 above.

70. Ar. *AP.* 45.2; 59.2–4; cf. law *apud* Dem. 24.63. The distinction is developed by Hansen, *Apagoge,* 21–28. A different classification is offered by Rhodes (note 67 above; 1979, 106–14).

71. [Dem.] 47.43; cf. IG. I^3, 78 = Meiggs/Lewis No. 73, lines 57–59.

72. Andok. 1.11; cf. Hansen, *Eisangelia,* 77–79.

73. IG. I^3, 40 = Meiggs/Lewis No. 52, lines 4–10. On the date, see note 21 above.

74. Ar. *AP.* 22.4 for the date of the ostracism of Hipparchos. Cf. A. E. Raubitschek, "Theophrastus on ostracism," *C et M.* 19 (1958): 73-109, at 107–8.

75. This date is defended by Funke (note 15 above), 96 n. 91. The alternative is 388.

76. Xen. *Hell.* 5.1.25–28, esp. 26–27.

77. [Dem.] 49.10 says explicitly that the Athenians were persuaded to acquit Timotheos. Pseudo-Plutarch (*Ten Orators* 836d = Lys. fr. 228 Sauppe) says that Iphikrates prosecuted Timotheos successfully in a trial which must be this one. Hansen (*Eisangelia,* 91) concludes that Timotheos was convicted. But [Dem.] 49, delivered eleven years after 373, is better evidence than the *Lives of the Ten Orators,* composed many centuries later.

78. Dem. 19.31, cf. 137, 191. Xenophon (*Hell.* 7.1.38) says that the Athenians executed Timagoras; the expression does not indicate whether Xenophon meant a decision of the assembly or one of a *dikastērion.*

79. Xen. *Hell.* 1.7.20 and 22. On the offense of *hierosylia,* see Cohen, *Theft,* 93–115.

80. Hansen, *Eisangelia,* 53–57. Hansen suggests associating the change with the introduction of *apophasis* (pages 56–57 above); this is attractive. In *Volksversammlung,* 117–18, Hansen proposes two reasons for the change: economy, since the rate of pay for attendance at the assembly was higher than for attendance at a court (cf. Rhodes, note 67 above, 1979, 108), and a desire to moderate the democracy in the direction of the supposed ancestral constitution. Different Athenians may have been swayed by different reasons, but surely they were generally alive to the juridical principle involved, as Aristotle (*AP.* 9.1) was, even though he viewed that principle unfavorably.

Chapter 5

1. Among many possible illustrations two may be mentioned as significant. W. G. Forrest entitled his thoughtful book on the early history of Greece *The Emergence of Greek Democracy* (London, 1966). P. J. Rhodes ("Athenian Democracy after 403 B.C.," *CJ.* 75 [1979–80]: 305–23, at 320–23) concludes a thorough study of fourth-century developments by asking whether the changes were democratic. His conclusion is mentioned here, not with a view to disputing his answer, but in order to note that he attaches importance to the question.

2. For example, following Thucydides (5.29.1; 5.31.6; 6.39), D. Kagan (*The Peace of Nicias and the Sicilian Expedition* [Ithaca, N.Y., and London, 1981], 40, 44, 222; cf. 49) speaks of democracy at Argos, Mantinea, and Syracuse. Democracy, or *dēmokratia,* is a key word in Thucydides 5–6 and in Kagan's book. Both the ancient and the modern historian assume that the reader knows what is meant.

3. J. A. O. Larsen, "Cleisthenes and the Development of the Theory of Democ-

racy at Athens," in M. R. Konvitz and A. E. Murphy, eds., *Essays in Political Theory Presented to George H. Sabine* (Ithaca, N.Y., 1948), 1–16, at 1.

4. For example, V. Ehrenberg, "Origins of democracy," *Historia* 1 (1950): 515–48, at 547: "the typical feature of early democracy was the majority vote of the people."

5. For example, G. E. M. de Ste. Croix, "The character of the Athenian Empire," *Historia* 3 (1954): 1–41, at 41: "The dividing line between oligarchy and democracy must be drawn somewhere. Surely the essential criterion is whether or not there is a property qualification for voting in the sovereign Assembly (see Busolt, Gr. Staatsk. I: 444 n. 1, 572)." A dividing line, such as Ste. Croix seeks, must be drawn only if *dēmokratia* and *oligarchia* were descriptive terms, capable of definition.

6. *Il.* 1.54–305; 2.48–399; 9.9–174; 20.4–40; *Od.* 2.1–257; 8.1–45.

7. *Hell. Oxy.* 16; J. A. O. Larsen, *Representative Government in Greek and Roman History* (California, 1955), 31–40.

8. For recent discussion of this topic, see G. L. Cawkwell, "The decline of Sparta," *CQ*. NS. 33 (1983): 385–400, at 385–90.

9. Nik. Dam. F. Gr. Hist. II A 90 F 60; interpreted by G. Busolt, *Griechische Geschichte* I^2 (1893), 657–58. A phrase of Diodoros (14.86.1) is sometimes emended to indicate that in 392 some Corinthians desired *dēmokratia;* even if Diodoros wrote that, he did not pause to say what he meant.

10. For example, Thuc. 1.67–85; Xen. *Hell.* 2.2.19–20; 5.2.11–20; 6.4.2–3; cf. A. Andrewes, "The Government of Classical Sparta," in E. Badian, ed., *Ancient Society and Institutions: Studies Presented to V. Ehrenberg* (Oxford, 1966), 1–20.

11. The only incident of the classical period which may illustrate such invalidation is Diod. 11.50; the evidence of Diodoros on such a matter is not good. Study of the rhetra can best start from H. T. Wade-Gery, "The Spartan Rhetra in Plutarch, *Lycurgus* VI," *CQ*. 37 (1943): 62–72; 38 (1944): 1–9 and 115–26 (= *Essays in Greek History* [Oxford, 1958], 37–85). I discussed the rhetra, with references, in "Probouleusis and the sovereign assembly," *CSCA*. 2 (1968): 247–69, at 250–56 and 266, and in "The origins of *demokratia,*" *CSCA*. 6 (1973): 253–95, at 270–71, reaching somewhat different views. I remain puzzled.

12. Xen. *Hell.* 2.3.18, 20, 51; 2.4.1, 2; Ar. *AP*. 36–37.

13. Thuc. 3.62.3. The word is used of the rule of the Thirty by Ar. *AP*. 36.1.

14. P. 2.86–88; cf. Sealey (note 11 above, 1973) 273. J. Bleicken ("Zur Entstehung der Verfassungstypologie im 5. Jahrhundert v. Chr.," *Historia* 28 [1979]: 148–72, at 150) maintains that Pindar refers, not to forms of constitution, but to the rival forces conflicting in the archaic city. But where there is good evidence on conflicts within the archaic city, notably on the rise of Peisistratos (Hdt. 1.59–64; cf. page 119 below), the rival forces do not resemble anything in Pind. P. 2.86–88 but are of an utterly different kind.

15. *To kyrion* is a key idea in the *Politics* of Aristotle; see, for example, 3.1281all–1282b13; 4.1290a30–33; 4.1297b35–1298a9.

16. M. H. Hansen, "*Demos, ecclesia* and *dicasterion* in classical Athens," *GRBS*. 19 (1978): 127–46; cf. page 69 above.

17. Inquiries into Athenian politics have often drawn their basic ideas from Greek political theory. Recent examples include C. Meier, *Die Entstehung des Politischen bei den Griechen* (Frankfurt-am-Main, 1980), and M. I. Finley, *Politics in the Ancient World* (Cambridge, 1983). Finley (p. 1) opens by citing with approval Aristotle's belief that democracy is the rule of the poor and oligarchy the rule of the rich. He adds: "Aristotle gave systematic formulation to a common but still rather loose

notion that was widely (perhaps universally) shared by the classical Greeks. It pervades their literature, among poets, historians and pamphleteers as well as political philosophers." Again, Meier's study assumes that "democracy" in a Greek context had a recognizable and constant meaning. The next two sections will show that the words *dēmokratia* and *oligarchia* did not have clear or constant meaning. Their behavior among people close to politics, orators and to some degree historians, was not so tidily predictable as among political philosophers.

18. For example, Thuc. 3.62.3; 5.31.6; 6.39.1–2; 8.47.2; 8.76.1; [Xen.] 2.20.

19. Thuc. 1.19; 5.31.6; 6.11.7; cf. [Xen.] 1.11. From Thuc. 5.31.6 it appears that Boiotia and Megara were called oligarchic. But judging from the passages referred to in this note, Lakedaimon was the *oligarchia par excellence.*

20. Ant. 6.45. I am indebted to M. H. Hansen (*Staten, Folket, Forfatningen,* 55) for drawing my attention to this passage.

21. M. Ostwald, *Nomos and the Beginnings of the Athenian Democracy* (Oxford, 1969), 96–136; the quotation is from page 97. The views presented in this section were set out in a fuller and more argumentative manner in my article of 1973 (note 11 above), especially at 272–90; I thank the editors of *Classical Antiquity* for permission to draw on them anew.

22. Athen. 15.695a–b. Whether the authors of the song told the plain truth is not the question here at issue. The present concern is solely with what they meant. Cf. Alkmaion of Kroton B4 (Diels/Kranz: health is *isonomia* of the powers, and disease is *monarchia* among them).

23. Thuc. 4.78.3.

24. Thuc. 3.62.3.

25. Hdt. 6.131.1; cf. Ar. *AP.* 29.3. Fifth-century usage, which accepted *dēmokratia* as the name for the current condition of the Athenians, probably identified Kleisthenes as the author of that condition; cf. E. Ruschenbusch, "*Patrios Politeia.* Theseus, Drakon, Solon und Kleisthenes in Publizistik und Geschichtsschreibung des 5. und 4. Jahrhunderts v. Chr.," *Historia* 7 (1958): 398–424, at 418–21.

26. Hdt. 5.78. On the meaning of this word, see J. D. Lewis, "Isegoria at Athens: When did it begin?" *Historia* 20 (1971): 129–40, superseding earlier discussions.

27. From Thuc. 8.64.3 it appears likely that the publicly professed slogan of the revolutionaries in 411 was *aristokratia;* cf. 3.82.8. Among themselves they could speak bluntly of *dēmokratia* and *oligarchia,* as at 8.47.2 and 8.48.4–5.

28. The correct interpretation of the passage was offered by R. Hirzel, *Themis, Dike und Verwandtes* (Leipzig, 1907), 263 with n. 8. It has been defended by J. R. Grant, "Thucydides 2.37.1," *Phoenix* 25 (1971): 104–7.

29. For example, *Il.* 2.198–206; Theognis 233–34, 847–50. A beginning has been made in studying the development of this word by W. Donlan, "Changes and shifts in the meaning of demos in the literature of the archaic period," *La Parola del Passato* 135 (1970): 381–95.

30. Andok. 1.96–98; cf. M. Ostwald, "The Athenian legislation against tyranny and subversion," *TAPA.* 86 (1955): 103–28, at 111–14.

31. For example, the law on *hybris,* Dem. 21.47; cf. E. Ruschenbusch, "*Hybreōs graphē.* Ein Fremdkörper im athenischen Recht des 4. Jh. v. Chr.," *ZSS.* 82 (1965): 302–9. Aristotle *Rhet.* 1.1373b38–1374a17 probably had the Athenians in mind as target of his criticism when he called for definition of theft and other offenses; cf. Cohen, *Theft,* 88–91.

32. SEG. 28.46, lines 5–6; first published by R. S. Stroud, "Greek inscriptions, Theozotides and the Athenian orphans," *Hesperia* 40 (1971): 280–301.

33. Andok. 1. 87–88; cf. page 37 above.

34. Dem. 22.51; cf. 24.51, 69, 163, 170, 190, 192. Aristotle (*AP.* 22.4) invokes the "gentleness" of the Athenian demos to explain why it allowed friends of the Peisistratidai to stay in Athens until the ostracism of Hipparchos. Evidently the "gentleness" of the *dēmokratia* was a current catchword. It is also to be noted that in writing about the ostracism of Hipparchos Aristotle chose words similar to those of Androtion (F. Gr. Hist. III B 324 F 6; cf. J. J. Keaney, "The text of Androtion F 6 and the origin of ostracism," *Historia* 19 [1970]: 1–11), and the boast about gentleness occurs in the two speeches composed by Demosthenes against Androtion and against the latter's ally, Timokrates. A literary connection may be suspected.

35. Dem. 20.108.

36. Isok. 7.60–61, noted further below.

37. In a similar but less verbose manner Demosthenes (10.11–15) maintained ten years later that Philip of Macedon was resolutely opposed to the constitution and *dēmokratia* of the Athenians.

38. Isok. 7.60–61. Different views on the date of composition are offered by W. Jaeger, "The date of Isocrates' Areopagiticus and the Athenian opposition," *Athenian studies presented to W. S. Ferguson = HSCP,* Supplementary Volume 1 (1940), 409–50, and K. Bringmann, *Studien zu den politischen Ideen des Isokrates* (= Hypomnemata 14 [Göttingen, 1965]), 73–81. For present purposes it suffices that the pamphlet was composed in the 350s.

39. Finley (note 17 above, 136 n. 39) writes: "The denial by Demosthenes (24.75–76) and Aeschines (3.6) that oligarchies were ruled by law merely reveals that truth was not a necessary condition in political oratory." When Demosthenes and Aischines agree, it is more prudent to suppose that Finley is mistaken about linguistic usage of the fourth century.

Chapter 6

1. A. M. Snodgrass, *Archaeology and the Rise of the Greek State* (Inaugural lecture, Cambridge, 1977), 10–18, 29–30; idem, *Cambridge Ancient History* III^2, 1 (1982), 687; A. Andrewes, *Cambridge Ancient History,* III^2, 3 (1982), 380.

2. Hdt. 5.66.2; 5.69.1; Hignett, *HAC.,* 51.

3. Pherekydes, F. Gr. Hist. I 3 F 2 = Markellinos, *Life of Thucydides,* 3.

4. L. Deubner, *Attische Feste* (Berlin, 1932), 70–91.

5. A. Boethius, *Die Pythais* (Uppsala, 1918), 107.

6. Hdt. 6.108; cf. G. S. Shrimpton, "When did Plataea join Athens?" *CP.* 79 (1984): 295–303.

7. Cf. P. B. Manville, "The Evolution of Athenian Citizenship: Individual and Society in the Archaic Age" (Ph.D. diss., Yale, 1979), 7–32. ("Eighth-century Athens had no citizenship but only a hierarchy of statuses within the larger membership of the tribes, phratries, gene," 17.)

8. *Od.* 2.26–27.

9. *Il.* 2.48–399. Other meetings of assemblies are described at *Il.* 1.54–305; 9.9–174; 19.40–237; 20.4–40; *Od.* 2.1–257; 8.1–45. For a fuller statement of the views presented in these paragraphs, see R. Sealey, "Probouleusis and the sovereign as-

sembly," *CSCA.* 2 (1968): 247–69, at 258–69. I thank the editors of *Classical Antiquity* for allowing me to draw on those arguments again.

10. Xen. *Hell.* 6.5.6–7. The other party too brought out their weapons and proved to be no less in number; a fight followed.

11. The law of Drakon as reinscribed in 409/8 (IG. I^3, 104 = Meiggs/Lewis No. 86, lines 18–19) says that members of the victim's phratry are to be chosen *aristindēn* for the purpose of reconciliation with the killer. The word *aristindēn* can be translated with honesty as "according to merit" or "according to worth," and one must then admit that the criteria of merit or worth are not known. To say, as some have done (Hignett, *HAC.*, 55), that the men were to be "chosen *aristindēn,* that is, from the aristocratic members of the phratry," is merely a pretentious disguise for ignorance.

12. It used to be held that *dikastai* replaced *ephetai* in the homicide courts, the change coming perhaps in the time of Perikles, although the title of *ephetai* was kept; see G. Smith, "Dicasts in the ephetic courts," *CP.* 19 (1924): 353–58. This view has been challenged by D. M. MacDowell, *Athenian Homicide Law in the Age of the Orators* (Manchester, 1963), 52–57, and Harrison, *Law* 2.40–42. On the view followed here the *dikastēria* were modeled on the ephetic courts, so material differences were probably small, but at least the title of *ephetai* was preserved.

13. Aristotle (*AP.* 3.4) says that the *thesmothetai* were instituted "to write down the *thesmia* and preserve them for judging disputes." That may be merely an inference from their name. If *thesmia,* as distinct from *thesmoi,* were verdicts as distinct from laws, Aristotle's statement of the original task of the *thesmothetai* is improbable, since Athenian practice shows no hint of the Anglo-American recognition of precedent as a source of law. If on the other hand *thesmia* were the same as *thesmoi* and were laws (cf. Ar. *AP.* 16.10), it is difficult to see what there was left for Solon to do, after the *thesmothetai* had been writing laws down for many years.

14. E. Ruschenbusch, *Untersuchungen zur Geschichte des athenischen Strafrechts* (Graezistische Abhandlungen 4 [Cologne, 1968]), 11–15.

15. *Od.* 6.207–8.

16. For example, *Il.* 9.432–95 (Phoinix); 23.83–92 (Patroklos); *Od.* 13.256–86 (Odysseus pretending to be a Cretan); Hdt. 1.35 (Adrastos); cf. P. A. L. Greenhalgh, "The Homeric *Therapon* and *Opaon* and their historical implications," *BICS.* 29 (1982): 81–90.

17. Solon F 70 *apud* Plut. *Sol.* 19.4. For interpretation, see E. Ruschenbusch, "*Phonos.* Zum Recht Drakons und seiner Bedeutung für das Werden des athenischen Staates," *Historia* 9 (1960): 129–54, at 132–35.

18. Cf. Ar. *AP.* 8.4.

19. Ar. *Pol.* 2.1274a22–25 (Zaleukos and Charondas); Hdt. 1.65. The Delphic oracle, quoted by Herodotos, inclined to think that Lykourgos was not a man but a god. The opinion of the oracle of Apollo deserves some respect.

20. Solon F 3, 4, 5cd, 7, 11, 12; cf. Appendix, page 142.

21. Stroud, *Drakon's Law,* 66–70.

22. *AP.* 4.1; 5.2; cf. R. Sealey, "Zum Datum der solonischen Gesetzgebung," *Historia* 28 (1979): 238–41.

23. 23.51; cf. 20.158; [Dem.] 47.71–72. Strictly speaking, the remark at 23.51 only says that the laws discussed hitherto in the speech are laws of Drakon; it need not apply to the laws still to be discussed. The difficulty remains great.

24. The hypothesis was proposed by Beloch, *Gr. Gesch.* I^2, 2, 258–62. Lately it

has been given less consideration than it deserves. For example, M. Gagarin (*Drakon and Early Athenian Homicide Law* [New Haven, 1981], 1 n. 1) writes: "the supposition of a religious source and a long period of development behind the homicide law, even if true, is not incompatible with the existence of a single human lawgiver." That is true. But the supposition of a religious source and of a long period of development serves to explain the complexity of the classical laws on homicide; it is not clear that the supposition of a single human lawgiver explains anything. That the snake was imaginary is a likely inference from Hdt. 8.41.2–3. From Ar. *Rhet.* 2.1400b20–23 it appears that Prodikos (if that is the right emendation of the text) took Drakon to be a man and made a joke about the ambiguity of his name. Certainly the hypothesis initiated by Beloch recognizes that by the classical period "the law of Drakon" was taken to mean a law issued by a gentleman of that name.

25. Thus the studies by Andrewes and Stroud, noted in the Appendix. A healthily skeptical approach to the biographical tradition on Solon is advocated by M. F. Lefkowitz, "Patterns of fiction in ancient biography," *The American Scholar* 52 (1983): 205–18, at 206–8.

26. Dem. 20.89–90; cf. page 47 above. The passage of Demosthenes is difficult to interpret (see notably M. H. Hansen, "Athenian nomothesia in the fourth century B.C. and Demosthenes's speech against Leptines," *C et M.* 32 [1980]: 87–104), but the attribution of current practice to Solon is clear.

27. On weights and measures, see the studies by Crawford and Chambers, mentioned in the Appendix, page 144. The earliest Athenian coins were not struck before the middle of the sixth century and perhaps not until appreciably later; see J. H. Kroll and N. M. Waggoner, "Dating the earliest coins of Athens, Corinth and Aegina," *AJA.* 88 (1984): 325–40, for a survey of the hoards with references to earlier views.

28. On the content of the *seisachtheia,* see now A. Andrewes, *Cambridge Ancient History* III^2, 3 (1982), 377–82; cf. idem, *The Greeks* (London, 1967), 104–10.

29. The difference is the basis for the thesis of M. Ostwald, *Nomos and the Beginnings of the Athenian Democracy* (Oxford, 1969). For criticism, see E. Ruschenbusch, *Gnomon* 43 (1971): 414–16.

30. Andok. 1.83–84; page 35 above.

31. For a fuller exposition of these arguments, see Sealey, *History,* 114–21. On the supposed council of four hundred, see Day and Chambers, *Aristotle's History,* 200–201. The belief that the Solonian property-classes were an innovation is part of a theory of which the other part says that before Solon Athenian society was divided into hereditary castes. Arguments against the latter thesis are included in the study by T. J. Figueira, "The ten archontes of 579/8 at Athens," *Hesperia* 53 (1984): 447–73.

32. Those adhering to the view include U. Kahrstedt, *Staatsgebiet und Staatsangehörige in Athen: Studien zum öffentlichen Recht Athens, Teil I* (Stuttgart and Berlin, 1934), 5. It is rejected by Hignett, *HAC.,* 98, and by Andrewes (note 28 above), 1982, 387.

33. Ar. *Pol.* 2.1273b41–1274a2; cf. *AP.* 9.1; page 67 above.

34. Aristotle (*AP.* 3.4) puts their origin before the work of Solon, and Thucydides (1.126.8) implies as much when he says that the nine archons received charge of the operations against Kylon.

35. [Plat.] *Hipparch.* 228b; Plut. *Sol.* 10.3.

36. The regionalist hypothesis starts from an observation of H. T. Wade-Gery,

JHS. 71 (1951): 219 n. 40 = *Essays,* 167 n. 2. It has been developed by R. Sealey, "Regionalism in archaic Athens," *Historia* 9 (1960): 155–80 = *Essays,* 9–38, and idem, *History,* 123–28, 141. Those who find it disagreeable have evidently been unable to furnish objections, for they have had recourse to abuse, for example, "cette étrange parodie" (P. Lévêque, "Formes de contradictions et voies de développement à Athènes de Solon à Clisthène," *Historia* 27 [1978]: 522–49, at 526).

37. Thuc. 1.126.3–7.

38. Hdt. 1.59.6; Thuc. 6.54.6.

39. On Delos, see Hdt. 1.64.2; Solon fr. 4a (West) *apud* Ar. *AP.* 5.2. The policies of Peisistratos and his sons are known from Hdt. 1.59–64; 5.94–95; 6.34–40; 6.103–4; Thuc. 6.54–59; Ar. *AP.* 16–19. The informative fragment of an archon list, illustrating cooperation among leading families, is accessible as Meiggs/Lewis No. 6. The policies of the Athenian tyrants, once in power, are mostly noncontroversial; one may consult general handbooks such as J. B. Bury and R. Meiggs, *History of Greece* (New York, 1975), 128–32. For a suggestive study, see H. T. Wade-Gery, "Miltiades," *JHS.* 71 (1951): 212–21 = *Essays,* 155–70.

40. On the poets, see Hdt. 7.6.3; [Plat.] *Hipparch.* 228c. The present state of archaeological research is assessed by F. Frost, "Towards a History of Peisistratid Athens," in J. W. Eadie and J. Ober, eds., *The Craft of the Ancient Historian: Essays in Honor of Chester G. Starr* (Lanham, 1985), 57–78, esp. 60–67. On Thespis and the beginnings of tragedy, see Ar. *Poet.* 1449a10–19 with the notes of D. W. Lucas in his edition (Oxford, 1968); for a full study, see A. Pickard-Cambridge, *Dithyramb, Tragedy and Comedy* (Oxford, 2d ed., revised by T. B. L. Webster, 1962), 60–131. On the City Dionysia, see Kolb (note 41 below).

41. F. Kolb, "Die Bau-, Religions- und Kulturpolitik der Peisistratiden," *JDAI.* 92 (1977): 99–138, at 124–30. Kolb's study as a whole stresses the personal character of the focus which Peisistratos and his sons provided for Athenian loyalty.

42. On the date of the reforms I adhere to the view expressed in *History,* 150–51. As far as I know, no historian has offered arguments against that view, although some have declined to follow it.

43. G. R. Stanton ("The tribal reform of Kleisthenes the Alkmeonid," *Chiron* 14 [1984]: 1–41) collects information on the location of many demes and probes the question, how the composition of the *phylai* helped the Alkmaionidai. For more general considerations, see Sealey, *History,* 151–57, 161–64, with discussion of the thoughtful inquiries of D. M. Lewis ("Cleisthenes and Attica," *Historia* 12 [1963]: 22–40) and P. J. Bicknell ("Kleisthenes as politician: An exploration," *Studies in Athenian Politics and Genealogy* = Historia Einzelschriften 19 [1972], 1–53). Bicknell's suggestions gain in force, if the division into *prytaneiai* was instituted by Kleisthenes.

44. For example, H. van Effenterre, "Clisthène et les mesures de mobilisation," *REG.* 89 (1976): 1–17; P. Siewert, *Die Trittyen Attikas und die Heeresreform des Kleisthenes* (Vestigia 33, Munich, 1982). Siewert would explain the tripartite structure of the *phylai* solely by military considerations. His thesis is criticized trenchantly in the review by W. Schuller, *Göttingische Gelehrte Anzeigen* 236 (1984): 11–21, and by Stanton (note 43 above), 3–7.

45. F. J. Frost, "The Athenian military before Cleisthenes," *Historia* 33 (1984): 283–94. Frost's thesis gains in credibility if the Plataian incident of Hdt. 6.108 took place after the reforms; a strong argument for that view on this long-disputed question has been offered by Shrimpton (note 6 above). But for an erudite defense of the date 519 for the Plataian incident, see Frost (note 40 above), 69–70.

46. Plut. *Sol.* 24.4 = Solon F 75. I discuss the growth in content of citizenship more fully in "How citizenship and the city began in Athens," *AJAH.* (forthcoming). I am indebted to the editor for permission to draw anew on views presented in that paper.

47. J. K. Davies, "Athenian citizenship: The descent group and the alternatives," *CJ.* 73 (1977–78): 105–21, at 115.

48. Hdt. 5.77.

49. A corrupt passage of Aristotle (*Pol.* 3.1275b36–37) says that Kleisthenes included many aliens and slaves in the *phylai.* Interpretation is difficult. The passage can be made to agree with the view adopted here.

50. Aisch. *Pers.* 319; *Seven* 548; *Supp.* 994; *Agam.* 57; *Cho.* 971; cf. *Supp.* 609; *Eum.* 1018. IG. I^3, 244C line 8.

51. Sources for events noted in this paragraph include Hdt. 5.97–103 (Athenian aid to the Ionian Revolt); 6.94–120 (the campaign of Marathon); 5.81, 5.89, 6.85–93 (the Aiginetan War); 7.144, cf. Ar. *AP.* 22.7 (the increase in the fleet). The figures for the Greek fleet of 480 are discussed by C. Hignett, *Xerxes' Invasion of Greece* (Oxford, 1963), 155–57, 209–10. I am much indebted to the article by J. Martin, "Von Kleisthenes zu Ephialtes," *Chiron* 4 (1974): 5–42; he argues successfully that the constitutional developments studied were not inspired by the desire for a distinctive form of government but were due to activities of which the criterion was the power of Athens. The thesis of the primacy of foreign policy is defended further by Ruschenbusch, *Athenische Innenpolitik.*

52. Thuc. 1.96.1. The circumstances of the foundation and the original character of the Delian League are somewhat obscure. Recent discussions include K. Raaflaub, "Beute, Vergeltung, Freiheit," *Chiron* 9 (1979): 1–22, and N. D. Robertson, "The true nature of the 'Delian League' 478–461 B.C.," *AJAH.* 5 (1980): 64–96, 110–33.

53. Thuc. 1.100.1; for the date, see F. Jacoby, "Some remarks on Ion of Chios," *CQ.* 41 (1947): 1–17, at 3 n. 1.

54. Ar. *AP.* 22.2; cf. 61.1.

55. This phenomenon has had much discussion. Recent studies include C. W. Fornara, *The Athenian Board of Generals from 501 to 404* (Historia Einzelschriften 16 [1971]): 11–27; P. J. Bicknell, "Double representation in the strategia at Athens," *Studies in Athenian Politics and Genealogy* (Historia Einzelschriften 19 [1972]): 101–12; E. Ruschenbusch, "Die Wahl der Strategen im 5. und 4. Jh. v. Chr. in Athen," *Historia* 24 (1975): 112–14; Rhodes, *Comm.,* 265–66.

56. Aischin. 1.27.

57. Xen. *Mem.* 3.4.1.

58. Ar. *AP.* 22.5; Hignett, *HAC.,* 321–26.

59. E. Badian, "Archons and *Strategoi,*" *Antichthon* 5 (1971): 1–34, at 22–26.

60. Ar. *AP.* 13.1–2.

61. This requirement of age is attested for councillors (Xen. *Mem.* 1.2.35; cf. IG. I^3, 14 = Meiggs/Lewis No. 40, lines 8–9) and for *dikastai* (Ar. *AP.* 63.3; cf. Dem. 24.150); cf. Hansen, *Embedsmaendene,* 15.

62. Dion. Hal. *Ant. Rom.* 7.3.1 (archonship); Hdt. 6.34–41 (sojourn in the Chersonese; cf. H. T. Wade-Gery, "Miltiades," *JHS.* 51 [1971]: 212–21, at 216–17 = *Essays,* 155–70, at 161–63); 6.103–10 (Marathon); 6.132–36 (Parian campaign).

63. Meiggs/Lewis No. 6 (archonship). Three other cases, though somewhat open to dispute, may illustrate the same principle: (1) Solon was archon in 594/93, but it has been argued that he carried out his public work about 580–570 (Hignett, *HAC.,*

316–21; S. S. Markianos, "The chronology of the Herodotean Solon," *Historia* 23 [1974]: 1–20). (2) Isagoras was archon in 508/7 (Ar. *AP.* 21.1), but it has been argued that the rivalry between him and Kleisthenes became acute about 503 (Sealey, *History,* 150–51). (3) Themistokles was archon in 493/92 (Dion. Hal. *Ant. Rom.* 6.34.1), but he first came to prominence shortly before 480 (Hdt. 7.143.1; cf. Sealey, *History,* 184–86; on the ostraka naming Themistokles and Megakles, see D. M. Lewis, "The Kerameikos ostraka," *ZPE.* 14 [1974]: 1–4).

64. Badian, note 59 above. It is reasonable to take the study no further than 457/56, when *zeugitai* were declared eligible for the archonship (Ar. *AP.* 26.2). The conclusions drawn by Badian are markedly different from those advocated here. For my own views I am much indebted to H. T. Wade-Gery, "Eupatridai, archons, and Areopagus," *CQ.* 25 (1931): 1–11, 77–89, at 80–81 = *Essays,* 86–115, at 104–6.

65. Hipparchos was archon in 496/95 (Dion. Hal. *Ant. Rom.* 5.77.6; 6.1.1) and was ostracized in 488/87 (Ar. *AP.* 22.3–4). For the archonship of Themistokles, see note 63 above; for his ostracism, see Thuc. 1.135.3; Plut. *Them.* 22.4. Among the twenty-eight known archons of 486/85–457/56, only one can be identified plausibly with a man who, "some say" (Hesych. s.v. *Menonidai*), had been ostracized. That is Menon, archon in 473/72 (Diod. 11.52.1). If he is Menon of Pharsalos, he had received Athenian citizenship, and his ostracism was not due to his own qualities but to a change in the relations between Athens and Thessaly (E. Vanderpool, *Ostracism at Athens* [Cincinnati, 1970], 26–27).

66. E. Ruschenbusch, "Ephialtes," *Historia* 15 (1966): 369–76. Better evidence would be available on Ephialtes if one could believe the statement of Aristotle (*AP.* 35.2) that the Thirty early in their activities took down from the Areopagos the laws of Ephialtes and Archestratos about the Areopagites. But the decree of Teisamenos (Andok. 1.83–84), carried during the restoration of 403/2 after the overthrow of the Thirty, provides that "the council of the Areopagos is to take charge of the laws, so that the offices observe the current laws." It follows that an Areopagite guardianship of the laws accords with the spirit of the traditional constitution (the *dēmokratia*). Therefore, Aristotle's statement about the Thirty and the laws of Ephialtes and Archestratos, with its implication that the Thirty brought about an Areopagite guardianship of the laws, should be dismissed as a later and propagandist invention (cf. Ruschenbusch, ibid., 371–72). See also E. Ruschenbusch, "*Patrios Politeia.* Theseus, Drakon, Solon und Kleisthenes in Publizistik und Geschichts-Schreibung des 5. und 4. Jahrhunderts v. Chr.," *Historia* 7 (1958): 398–424, esp. 399–408.

67. A careful reconstruction of the first type, attributing extensive measures to Ephialtes, is offered by Rhodes, *Boule,* 144–207. Attempts to reconstruct a reform of a limited kind may claim inspiration from H. T. Wade-Gery, "The judicial treaty with Phaselis and the history of the Athenian courts," *Essays,* 180–200. I have discussed the problem previously in "Ephialtes," *CP.* 59 (1964): 11–22 = *Essays,* 42–58, and "Ephialtes, *eisangelia,* and the council," in G. S. Shrimpton and D. J. McCargar, eds., *Classical Contributions: Studies in Honor of M. F. McGregor* (Locust Valley, N.Y., 1981), 125–34.

68. W. S. Ferguson, "The oligarchic revolution at Athens of the year 103–2 B.C.," *Klio* 4 (1904): 1–17, at 5.

69. I thank R. Kallet-Marx for pointing this out to me. Some statements of Aristotle (*AP.* 3.6; 8.4) can with a good deal of imagination be interpreted to reveal trial of *euthynai.* But the vagueness of the statements is probably a cover for their author's ignorance.

70. Aischin. 3.14–15; Lys. 15.2; [Dem.] 40.34; cf. Lipsius, *AR.*, 271–77.

71. Ar. *AP.* 45.3; 55.2; cf. pages 63–64 above.

72. The trial of Kimon in 463 is known from Ar. *AP.* 27.1; Plut. *Kim.* 14.3–5; *Per.* 10.6. For the expedition of Kimon to Ithome and the change in Athenian alliances, see Thuc. 1.102; Plut. *Kim.* 15–17; cf. *Per.* 9.5. The opposition of Ephialtes to sending the expedition to Ithome is known from Plut. *Kim.* 16.9. His naval expedition beyond the Chelidonian islands is known from Plut. *Kim.* 13.4. It is possible that in 462 Kimon led an expedition to Cyprus, presumably before he was sent to Ithome (J. Barns, "Cimon and the first Athenian expedition to Cyprus," *Historia* 2 [1953–54]: 163–76). The conclusion offered in this paragraph has been prompted in part by Martin (note 51 above), 29–40, and Ruschenbusch, *Athenische Innenpolitik,* 57–65.

73. [Xen.] 1.16–18. Athenian encroachment on allied jurisdiction is studied by G. E. M. de Ste. Croix, "Notes on jurisdiction in the Athenian Empire," *CQ.* NS. 11 (1961): 94–112 and 268–80.

74. Dem. 24.21; Ar. *AP.* 43.4–6; cf. M. H. Hansen and F. Mitchel, "The number of ecclesiai in fourth-century Athens," *SO.* 59 (1984): 13–19.

75. *AP.* 24.3; M. H. Hansen, "Seven hundred *archai* in classical Athens," *GRBS.* 21 (1980): 151–73.

76. Ar. *AP.* 27.3; cf. Rhodes, *Comm.*, 338–40.

77. Suggested dates are reviewed by R. Sealey, "The origins of *demokratia,*" *CSCA.* 6 (1973): 253–95, at 257–59. The statement at 2.18 was probably written before the *Knights* of Aristophanes (425/24). At 2.16 the author says that the Athenians deposit their property in the islands and look on while the land of Attica is ravaged. This was the strategy which they practiced during the Archidamian War and contemplated for some years before its outbreak.

78. Thuc. 8.65.3. The main sources for the revolution are Thuc. 8.47–98; Ar. *AP.* 29–33; Lys. 20. As a reconstruction of the course of events the study by Hignett, *HAC.*, 268–80 and 356–78, has not been superseded.

79. The latter view was propounded by G. E. M. de Ste. Croix, "The constitution of the five thousand," *Historia* 5 (1956): 1–23; cf. R. Sealey, "The revolution of 411," *Essays,* 111–32, and "Constitutional changes in Athens in 410 B.C.," *CSCA.* 8 (1975): 271–95. Its critics include P. J. Rhodes, "The five thousand in the Athenian revolutions of 411 B.C.," *JHS.* 92 (1972): 115–27, and Ruschenbusch, *Athenische Innenpolitik,* 167–69.

80. Xen. *Hell.* 1.1.11–22. On the chronology, see Sealey (note 79 above, 1975), 273–75.

81. IG. I^2, 304A = Meiggs/Lewis No. 84; cf. K. J. Beloch, "Zur Finanzgeschichte Athens IV," *RM.* 39 (1884): 239–44; idem, *Gr. Gesch.* II^2, 1, 397–98. The *diōbelia* may have continued as late as 404/3: A. M. Woodward, "Financial documents from the Athenian agora," *Hesperia* 32 (1963): 144–55, at 150.

82. Xen. *Hell.* 2.3.2 and 11.

83. Ar. *AP.* 35.3; Lys. 12.5 (virtue and justice). The words *kaloi k'agathoi* occur repeatedly in Xenophon's account of the rule of the Thirty (*Hell.* 2.3) and at Diod. 14.4.1.

84. This story has been told brilliantly by P. Funke, *Homonoia und Arche* (Historia Einzelschriften 37 [1980]): 1–26, 57–70.

85. *AP.* 41.3; 62.2; cf. Aristoph. *Ekkl.* 289–93; Rhodes, *Comm.*, 492.

86. Ar. *AP.* 43.4–6; note 74 above.

87. Polyb. 2.62.7 provides the figure of 5,750 talents for the assessment of 378/77; cf. Dem. 14.19, 27, 30. The thesis that the *proeisphora* was instituted in 378/77 was

presented by G. E. M. de Ste. Croix, "Demosthenes' TIMHMA and the Athenian eisphora in the fourth century B.C.," *C et M.* 14 (1953): 30–70. See also R. Thomsen, *Eisphora* (Copenhagen, 1964). The levy of 428/27 is known from Thuc. 3.19.1, but it is not clear whether Thucydides' remark excludes earlier levies; see J. G. Griffith, "A note on the first Eisphora at Athens," *AJAH.* 2 (1977): 3–7.

88. An earlier date (about 390) for the introduction of written pleadings and testimony and a reason for the change have been proposed, perhaps rightly, by E. Ruschenbusch, "Drei Beiträge zur öffentlichen Diaita in Athen," *Symposion 1982* (Valencia, 1985): 31–40, at 34–35.

89. Ar. *AP.* 54.3; Rhodes, *Boule,* 134–38.

90. The contemporary source is Aischin. 3.25. Previous inquiries into the work of Euboulos have been superseded by G. L. Cawkwell, "Eubulus," *JHS.* 83 (1963): 47–67.

91. [Plut.] *Ten Orators* 841b–c, 852b. Constitutional developments from 403 to 322 are surveyed, more fully than here, by P. J. Rhodes, "Athenian democracy after 403 B.C.," *CJ.* 75 (1979–80): 305–23; he discusses Lykourgos at 313.

92. Ar. *AP.* 61.1; cf. Rhodes, *Comm.,* 678–79, 682. Specialization is reflected in inscriptions, for example, IG. II^2, 204 lines 19–20; 556 line 14; 682 lines 5, 15, 22–24, 30–31, 44; C. Michel, *Recueil d'Inscriptions Grecques,* Supplément II (Brussels, 1927), 156–58, no. 1704.

Chapter 7

1. A contrasting view has been developed by D. P. Maio, "*Politeia* and adjudication in fourth-century B.C. Athens," *American Journal of Jurisprudence* 28 (1983): 16–45. He maintains: "The empty myth of the modern Anglo-American and Continental legal cultures, that adjudication is or can be independent from the basic political ordering of society, had no acceptance at all in fourth-century B.C. Athens." His thesis depends on the notion of a "democratic *politeia,* as political culture" (p. 18), but "democratic" is only described in vague terms such as "freedom."

2. Cf. H. J. Wolff, *Roman Law: An Historical Introduction* (Oklahoma, 1951), 193–206.

3. *Lietuvių Enciklopedija* (*Lithuanian Encyclopedia*), XXVIII (Boston, 1963), 335 (K. J. Čeginskas).

This page intentionally left blank.

Index

Achilles, shield of, 78–81, 110–11
adoption, 26–28
adultery, 10, 30–31, 73
aidesis, 75–76
Aischines, 13, 38, 41, 44, 88, 106
Aischylos, 71, 125
aliens, 23, 38, 70, 72, 124, 157 note 77; *see also* metics
Alke, 8, 16
anakrisis, 53, 69, 80–81
Anaximenes, 143–45
anchisteis, 26
Andokides, 34–35, 37–38, 40, 46–47, 58, 84 with note 72, 116, 132
Androtion, 170 note 34
Antimachos, 87–89
Antipater, 6, 93
Antiphon, 10, 60, 98 with note 20
apagōgē, 30–31, 56
apoina, 74–75
apoinān, 75
apophasis, 56–57, 137
appeal, 62–66
arbitration, 58, 62, 64, 78, 135
archons, 53, 55, 62–64, 109, 111–13, 123, 128–29, 131
Areopagos: *See* council of the Areopagos
Arginousai, trial of generals after, 86, 89
aristocracy, 111, 123
aristokratia, 100–101, 169 note 27
Aristophanes, 47, 59–60
Aristophon, 23
Aristotle, 91; *Constitution of the Athenians,* 2, 19, 55, 59, 61–63, 67–68, 70, 73, 85, 97–98, 112, 115–16, 118, 121–22, 129–30, 138, 140, 143; *Ethics,* 33–34, 51, 97; *Magna Moralia,* 153 note 15; *Rhetoric,* 88; will of, 157 note 77
assembly, 34, 40–42, 46, 48, 57, 62, 67, 69, 83–90, 93–98, 109–11, 122, 132, 135–36
Athenaios, 6
atimia, atimos, 43, 54, 65, 113–14
Atthidographers, 119, 140
axones, 49, 140–45

bequest, 20, 26–28
Boiotos, 15
Brauron, 119

Chalkis, Athenian decree concerning, 64–65, 85
Charondas, 115
Chersonese, 120–21
children, 10, 14; coming of age of, 15, 63, 67
citizens, Athenian, 5–7, 29–30, 114; revision of list of, 16, 63
citizenship, Athenian, 15, 17, 22–25, 124–26, 139
class struggle, 148
Claudian *gens,* 29
concubine: See *pallakē*
Constitution of the United States, 51–52, 66
Corinth, 94–95
council of five hundred, 15, 36, 39, 41, 49, 57, 63–64, 83–85, 90, 122–23, 131, 133–36; secretary of, 46, 136
council of four hundred, 118

council of the Areopagos, 56–57, 70–73, 80, 83, 109, 114, 129–31, 137

daughters, 24
decrees: See *psēphismata*
Dekeleia, Dekeleieis, 13, 15, 65
Delian League, 127, 132, 139
Delphinion, 70–71, 73
deme, 12, 15, 17–19, 23–24, 63, 122, 125
Demetrios of Phaleron, 6, 8–9
democracy, 2–4, 91–92, 96, 123, 139, 146
dēmokratia, 34, 37, 43, 58, 91–106, 116, 130, 138–39, 146
Demophantos, 102–3
Demosthenes, 3, 12, 16, 25, 28, 37–38, 41, 44, 56, 60–61, 70, 73, 75–76, 87–89, 94, 104–5, 113, 115
Demotionidai, 13, 65
dikastai, 36, 42, 53–54, 58–60, 67, 81, 83, 85–87, 97–98, 133–34, 139; oath of, 32, 42, 60, 67, 69, 118
dikastērion, 3, 42, 53–70, 77, 83–90, 98, 118, 131, 137
dikē, 30, 54–55, 77–78
Dionysia, 120–21
Dionysos Eleuthereus, 120–21
dokimasia, 63–64, 130–31
dowry, 19, 21–23
Drakon, 14, 35, 46, 72, 76, 115–17, 135, 140–45
due process, 85, 89

eisangelia, 57, 82–90, 137
eisphora, 136
ekklēsia: See assembly
Eleusis, 108
Eleven, the, 30, 56, 90
endeixis, 56
ephēgēsis, 56
ephesis, 62–66, 83, 85–90
ephetai, 57, 70–74, 76–77, 112–14, 121
Ephialtes, 129–31, 143–44
epiklēros, 18, 20–21
Epikouros, 157 note 77
Ergokles, 86–87, 89
Ergophilos, 88–89
Eteoboutadai, 13
Euboulos, 137
Euktemon, 8, 16
Euryptolemos, 49–50, 86, 89
euthynai, 130

Forty, the, 58, 135

generals: See *stratēgia, stratēgoi*
genos, genē, 13, 17, 29, 108–9
Gephyraioi, 29, 108
Germany, Federal Republic of, Fundamental Law of, 52
graphē, 54–55, 82–83
graphē nomon mē epitēdeion theinai, 44, 116, 135
graphē paranomōn, 44–45, 49–50, 54, 97

hēliaia, 60–70, 77, 118–19, 121
Herodotos, 29, 47–48, 61, 85, 97–100, 109, 119, 121, 123, 127–28, 138
Hesiod, 11, 25, 46, 79, 82, 147
Hipparchos, 85, 88
homicide, courts for, 3, 57, 70–77, 112, 114; law of, 10–11, 54–55, 70–77, 90, 115; *see also* Drakon
Horace, 82
house, protection of, 25–26, 30–31
Hypereides, 8, 57

Iliad, 74, 77–81, 93, 110–11
inheritance: See succession
Isaios, 9–10, 13, 16–17, 23, 28
Isokrates, 105, 130
isonomia, 99–101, 146

joinder of the issue, 79–80; see also *paragraphē*

Kallisthenes, 88–89
Kallixenos, 49–50, 86, 89
Kannonos, 49–50, 89
katagnōsis, 83, 90
Kephalos, 8
Kimon, 131
king-archon, 55, 57, 70–71, 112, 114
kings, medieval and modern, 66, 147–48
Kleidemos, 130
Kleisthenes, 12, 15, 100, 121–26, 129, 139

Konon, 28
Ktesikles, 6, 8
Kylon, 120
kyrbeis, 140–45

law, codification of, 35–41, 45–48, 69, 117–19, 146
law, Roman: *See* Roman law
law, rule of, 51, 91, 106, 146–48
lawgivers: See *nomothetai*
laws: See *nomos, nomoi*
laws, revision of, 35–46, 134–35, 139
laws, unwritten, 38–39
Lykourgos of Athens, 85, 137
Lykourgos of Sparta, 115
Lysias, 12, 36, 86–87

Mantias, 15
Marathon, 109, 120, 126–27, 129
marriage, 19–23
marriages of citizen and alien, 24
Marx, Karl, 148
metics, 6–8, 55, 125
Miltiades, 85, 89, 121, 129

Nikomachos, 36, 45–46
Nikomenes, 23
nomos, nomoi, 32–52, 83, 94
nomothesia, 36, 40–44, 97, 135
nomothetai, 34–36, 41–43, 45, 48, 89
nothos, 22–23

Odyssey, 74, 77, 82, 93, 110, 113
oikia, 25–26
oikos, 25–27, 29
oligarchia, 92, 98–106, 138

Palladion, 70–72, 75
pallakē, 21–23
Panathenaia, 77
paragraphē, 54, 68–69, 80, 135
Pasion, 8; will of, 157 note 77
patria potestas, 29
Peisistratos, 14, 119–21, 125
Perikles, 39, 46–47, 59, 98, 101–2, 132–33
Philaidai, 108
Phile, 10, 18, 21
phratry, 3, 13–18, 23–24, 65, 108–9
Phreatto, 70–71
phyle, phylai, 12, 15, 42, 108, 122–23, 125, 127
phylobasileis, 71
Pindar, 97, 127
Plataia, 109
Plato, 2, 97
Plutarch, 72, 95, 116, 124, 131, 141–42
poinān, 74
poinē, 74
poisoning, 10, 70
polemarch, 55, 113, 127
population of Attica, 6, 107–8
privilegia, 38, 40
proanakrisis, 53, 61, 68–69, 81
probouleuma, 41, 84, 86
proedroi, 42, 136
proeisphora, 136
Prytaneion, prytaneion, 70–71, 108–9, 114, 141
prytaneis, prytaneiai, 42–43, 122, 136
psēphismata, 32–35, 39, 41–47, 49–51, 94, 132
Pseudo-Plato, 33
Pseudo-Xenophon, 91, 98, 133
Pyrrhos, 10, 17–18, 21

regionalism, 119–20, 122
retaliation, right of: *See* self-help
revolution of 411, 6, 45
revolution of 404: *See* Thirty, the
Roman law, 44, 147; formulary procedure of, 66, 78, 80–81; of marriage, 21; of succession, 26, 28–29; reception of, 1, 147
royal stoa: See *stoa basileios*

Salamis, 126–27
sanction of law, 4
self-help, 31, 74–77, 79, 112–13
shield of Achilles: *See* Achilles, shield of
Sigeion, 120–21
slaves, 6, 8–9, 70
Solon, 11, 47–50, 61, 67–68, 77, 115–20; law of amnesty of, 114, 125; law on immigration of, 124–25; laws of, 3, 26–27, 35, 45, 47, 51, 72, 75, 113–14, 124–25, 135, 140–45

sortition, 128
sources of law, 4
sovereignty, 44
Sparta, 80, 93–95
stoa basileios, 37, 120, 140, 143–44
stratēgia, stratēgoi, 123, 127–28, 137
succession, law of, 22, 25–28

Tegea, 111
Teisamenos, 35–37, 40, 42, 46, 117, 135
theft, 30–31, 60, 66–67
theoric fund, 137
Theozotides, 103
Theseus, 108–9
thesmoi, 35, 48, 117
thesmothetai, 55, 60–61, 63–64, 90, 113, 119
Thirty, the, 27, 35, 37, 46, 95–96, 103, 134
Thrasyboulos, 86, 95
Thrasyboulos of Kollytos, 87, 89
Thucydides, 6, 9, 45, 91, 93, 95, 98, 100–101, 108–9, 111–12, 119, 127, 132–33, 138
Timagoras, 88–89
Timokrates, 89–90, 105
Timotheos, 87, 89
tyranny, 72–73, 99, 106, 114; *see also* Peisistratos

unification of Attica, 108–9

voting, origin of, 110–11

wergild, 74, 113
Wolff's theory of the origin of judicial litigation, 80–81, 112
women, 9–12, 16–23
written pleadings and testimony, 59, 136

Xenophon, 9, 11, 46–47, 86, 89, 95

Zaleukos, 115